(2) (3)

No. 93-1040 and No. 93-1068

Supreme Court, U.S.
FILED
JAN 27 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

NO. 93-1040

EMPRESA NACIONALE SIDERURGICA, S.A.,

Petitioner,

versus

JERRY YOUNG,

Respondent.

NO. 93-1068

ARMADORES de CABOTAJE, S.A.,

Petitioner,

versus

JERRY YOUNG,

Respondent.

Petitions for Writs of Certiorari to the Louisiana Fourth Circuit Court of Appeal

BRIEF FOR RESPONDENT

LAWRENCE S. KULLMAN (#7884)
LEWIS & KULLMAN
2615 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: 504/588-1500
Counsel of Record

FREDERICKA HOMBERG WICKER (#6977)
434 Bellaire Drive
New Orleans, Louisiana 70124
Telephone: 504/482-1887

Attorneys for Respondent, Jerry Young

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

127 pp

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

II. SUMMARY OF ARGUMENT 10

III. ENSIDESA'S WRIT APPLICATION SHOULD BE DENIED BECAUSE IT WAS NOT DENIED DUE PROCESS UNDER THE FOURTEENTH AMENDMENT BY THE APPLICATION OF LOUISIANA CODE OF EVIDENCE ARTICLE 606B. 11

IV. ARCASA'S WRIT APPLICATION SHOULD ALSO BE DENIED 22

A. The holding below does not conflict with *Derr* as properly interpreted 22

B. Granting this writ would not serve the interests of uniformity 25

C. Your Honors should refuse to grant the writ because the Louisiana Fourth Circuit Court of Appeal properly interpreted the duties owed under 33 United States Code section 905(b) and found that there was sufficient evidence to support the jury verdict 26

V. CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Carpenter v. Universal Star Shipping SA, 924 F.2d 1539 (9th Cir. 1991) 29

Coody v. Richardson, 569 So. 2d 1012 (La. App. 3d Cir. 1990), *cert. den'd*, 572 So. 2d 90 (1991) 23

Derr v. Kawasaki Kisen K.K., 835 F.2d 490 (3d Cir. 1987), *cert. den'd*, 486 U.S. 1007 (1988) 22-25, 26

Government of Virgin Islands v. Gereau, 523 F.2d 140 (3d Cir. 1975), *cert. den'd*, 424 U.S. 917 (1976) 18

Harris v. Flota Mercante Grancolumbiana, S.A., 730 F.2d 296 (5th Cir. 1984) 22, 25, 26

Kirsch v. Plovidba, 971 F.2d 1026 (3d Cir. 1992) 24

Lemon v. Bank Lines, Ltd., 656 F.2d 110 (5th Cir. 1983) 22, 25, 26

Marine Terminals v. Burnside Shipping Co., 394 U.S. 404 (1969) 26

Martinez v. Food City, Inc., 658 F.2d 369 (5th Cir. 1981) 18

McDonald v. Pless, 238 U.S. 264 (1915) 13-15

Riggs v. Scindia Steam Nav. Co., 8 F.3d 1442 (9th Cir. 1993) 22, 27-29

Scindia Steam Nav. Co. v. De Los Santos, 451 U.S. 156 (1981) 8, 24, 26-27, 30

Shillcutt v. Gagnon, 827 F.2d 1155 (7th Cir. 1987) 19

Smith v. Phillips, 455 U.S. 209 (1982) 12

TABLE OF AUTHORITIES – Continued

Page

State v. Shillcutt, 341 N.W.2d 716 (Wis. App. 1983) 19

State v. Shillcutt, 350 N.W.2d 686 (Wis. 1984) 19

Tanner v. United States, 483 U.S. 107 (1987) ... 13, 16, 21

Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981), *cert. den'd*, 459 U.S. 967 (1982).. 22, 27, 28, 29

United States v. Casamayor, 837 F.2d 1509 (11th Cir. 1988), *cert. den'd sub nom. Barker v. United States*, 488 U.S. 1017 (1989) 18

United States v. Duzac, 622 F.2d 911 (5th Cir. 1980), *cert. den'd*, 449 U.S. 1012 (1980) 17-18, 21

Woods v. Sammisa Co., Ltd., 873 F.2d 842 (5th Cir. 1989), *cert. den'd*, 493 U.S. 1050 (1990)..... 22

Young v. Armadores de Cabotaje, S.A., 617 So. 2d 517 (La. App. 4th Cir. 1993) 9, 12, 25

Young v. Armadores de Cabotaje, S.A., 625 So. 2d 171 (La. 1993) 12

OTHER:

33 U.S.C. § 901, *et seq.* (Longshore & Harbor Workers' Compensation Act)..... 1, 27, 29

33 U.S.C. § 905(b) 1, 22, 23, 24, 29

House Report, 1972 U.S.C.C.A.N. at 4704..... 27-28

Louisiana Code of Civil Procedure article 1793..... 23

Louisiana Code of Evidence article 606B 10, 11, 13

LSA – R.S. § 22:655, *et seq.* (Louisiana's Direct Action Statute) 9

Federal Rules of Evidence Rule 606(b) ... 11, 15, 18, 21

MAY IT PLEASE THE COURT:

I.

STATEMENT OF THE CASE

Respondent, Jerry Young, a longshoreman, brought suit in the Civil District Court for the Parish of Orleans, State of Louisiana, seeking damages for injuries he sustained while off-loading steel beams from a vessel, the M/V LORENA, in the Port of New Orleans, Louisiana. The defendants were Empresa Nacionale Siderurgica, S.A., (Ensidesa), a Spanish steel manufacturer that had loaded the cargo in Aviles, Spain, and chartered the vessel for the voyage from Spain to New Orleans; and Armadores de Cabotaje, S.A., (Arcasa), the owner and operator of the vessel. The plaintiff claimed that Arcasa and Ensidesa were both liable for negligence under section 905(b) of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 901, *et seq.*; 33 U.S.C. § 905(b), hereinafter referred to as "905(b)") and, additionally, that Ensidesa, as the stevedoring company that had loaded the vessel, was liable for negligence under the general maritime law.

On November 22, 1982, Jerry Young, then a 46-year-old experienced longshoreman employed by Cooper Stevedoring, was working with his gang in the No. 2 hold of the M/V LORENA, off-loading steel beams. Young App. 43a.

The beams could have been stowed on either the edges (the "H" position) or on the flanges (the "I" position). When the beams are stowed in the "H" position, the

edges of the beams cut into dunnage placed to separate the layers of beams. The extent of the damage to the dunnage depends on the weight of the stow (that is, how high the steel beams are loaded within the hold of the vessel) and the quantity and quality of the wood dunnage used. Stowage in the "H" position also creates an uneven surface on which the men have to walk while off-loading the cargo. Young App. 44a.

In contrast, stowage in the "I" position results in the dunnage resting on the beams' flat flanges, thus preventing the dunnage from being cut. Stowage in this manner also gives the longshoremen a flat surface upon which to walk and work. Young App. 44a.

Ensidesa clearly knew that use of the "H" method to stow the steel beams tends to cut and crush the dunnage between the tiers of steel beams. Ensidesa further knew that, when the dunnage was crushed, it made safe off-loading with standard rigging very difficult, if not impossible.[1] Young App. 45a.

Indisputedly, the master of the M/V LORENA (an Arcasa employee) was the person ultimately responsible for the manner in which the cargo was stowed and was a

---

[1] When Ensidesa's own longshoremen, in Spain, encountered crushed dunnage, they used a giant clamp to lift the beams sufficiently to replace the crushed dunnage, thereby permitting the placement of chains for off-loading. Ensidesa's director of the Port of Aviles had been to the United States and observed American stevedoring operations and knew that the giant clamps used by Ensidesa in Spain were not utilized by stevedores in the United States, who were unaware of their existence. Young App. 45a.

co-participant with Ensidesa's port captain in preparing, approving and ultimately accepting the stowage.

Serafin Garcia testified in pertinent part as follows:

> Q. Mr. Garcia, it's my understanding that you are employed by Ensidesa as the director of the Port of Aviles?
>
> A. Yes.
>
> . . .
>
> Q. As port director, you supervise all activity carried on at the port?
>
> A. Yes.
>
> Q. Does that include responsibility for the manner in which vessels are stowed?
>
> A. Yes.

(R. Vol. V at 350-51.)

> Q. The master of the vessel works with Captain Cazon as operations director of the port to work out a stowage plan prior to loading any vessel; is that right?
>
> A. Yes.

(R. Vol. V at 352.)

> Q. In 1982 all steel beams being loaded from the port of Aviles were loaded in the H method; is that right?
>
> A. Yes.

(R. Vol. V at 353.)

> Q. In 1982 Ensidesa chartered the M/V Lorena from the company Arcasa; is that right?

A. Yes.

(R. Vol. V at 354.)

Q. If you know, is the master of the Lorena employed by the owner of the Lorena?

A. The captain in 1982 of the vessel as well as the captain in 1989 to date wherever the vessel may be is always an employee of the owners of the vessel, whoever they may be.

(R. Vol. V at 356.)

Q. And it is Ensidesa and the master of the vessel who prepare the stowage plan, correct?

A. Yes.

(R. Vol. V at 361.)

Q. Do you know, Mr. Garcia, after the vessel is loaded and before it leaves the Port of Aviles, does the captain of the vessel have to accept the vessel from Ensidesa?

A. Yes, correct, because the captain of the vessel is personally all the time the responsible person of the cargo, since he is responsible for the delivering the merchandise to designation in the best possible conditions.

(R. Vol. V at 364.)

Florentino Cezon Cuiroz testified further as follows:

Q. By whom are you employed, sir?

A. By Ensidesa.

Q. What is your job, sir?

A. Chief of port operations for Ensidesa in Aviles.

Q. Do you supervise stevedoring operations in the port?

A. Yes. . . .

Q. Did you use the same stowage method for voyages as for the voyage in 1982 for the M/V Lorena?

A. Yes, exactly the same.

Q. Have you loaded many other vessels in the past in the same manner you loaded the Lorena?

A. Yes, and it's still being done the same way today.

(R. Vol. V at 406-07.)

Q. And you always review those plans with the master or captain of the vessel?

A. Yes.

Q. And the captain or master of the vessel must approve those plans, correct?

A. Yes, because he's the responsible person.

. . .

Q. When you prepare the plans to load the vessel, is it your responsibility to take into consideration the safety of the stow?

A. Yes.

. . .

Q. As part of your job when you prepare the stowage plan, is it part of your responsibility to prepare a stow so that the cargo is stowed in a safe manner?

A. Yes.

(R. Vol. V at 410-12.)

Q. Who has the last word with regard to the manner of a stow?

A. The captain.

(R. Vol. V at 415.)

After the M/V LORENA arrived at the Port of New Orleans, Cooper Stevedoring began the off-loading process. Captain Ross, a marine surveyor employed by Cooper, the off-loading stevedore, to monitor the off-loading, found that the dunnage between the tiers of beams had become compressed and/or broken up, creating a dangerous stow. Young App. 47a.

As the longshoremen removed cargo from the hold of the LORENA and reached lower tiers of beams, the dunnage was found to be more and more crushed until the steel beams virtually rested on top of each other, without any separation at all. Young App. 46a-47a.

In these circumstances, it became impossible for the longshoremen to insert the wires far enough onto the beams to lift them and place the chains. The longshoremen had to "nip" the ends of the beams; that is, someone managed to lift one end of a beam a short distance while fellow longshoremen threw wood chunks under the beam and then forced the wire back farther. In effect, the longshoremen were having to put in dunnage after the cargo had been stowed. Young App. 48a.

Captain Ross testified that he had never seen a stow of steel beams as bad as the one he observed on the M/V LORENA in November 1982. Young App. 47a.

Mr. Young's longshore gang had no alternative but to continue to off-load the vessel as carefully as they could.

In due course, while the longshoremen were attempting to "nip the beams," a wire slipped off a beam and a T-bar, part of the lifting tackle, began swinging wildly through the hold and, in the process, it hit Jerry Young in the head and knocked him unconscious and caused him to fall onto the steel beams, suffering severe injuries to his back. Young App. 49a.

As of the time of trial, about seven years later, Mr. Young had been hospitalized eight times; he had had three surgical procedures on his back; he had received anesthetic injections into the muscles around his spine on approximately 40 occasions; he had been hospitalized to have morphine injected into his spine on at least three occasions; he was regularly taking an oral narcotic pain medication; and he was permanently and totally disabled. Young App. 49a-51a, 64a.

The medical testimony established that Mr. Young would probably continue to suffer to the same extent for the remainder of his life and he would continue to require significant ongoing treatment for the relief of his symptoms, including, *inter alia*, hospitalization and probably additional surgery. Young App. 64a.

In addition, Mr. Young suffered substantial psychological injury as a result of his injuries and resulting inability to work. As Dr. Robert Newman, his treating psychiatrist testified, Mr. Young's whole sense of self was tied up in his ability to do his job and do it well. Young App. 65a. The combination of the physical disability and pain coupled with the vocational disability caused Mr.

Young to suffer severe depression and anxiety. According to Dr. Newman, he had difficulty in sleeping, loss of appetite and decreased interest in sex. Young App. 65a.

In January 1989 Mr. Young's depression got worse, and he told Dr. Newman that he had no hope and saw no future for himself, and he was seriously thinking about suicide. Young App. 65a.

As Dr. Newman testified at trial, Mr. Young's "image of himself had been damaged beyond repair" by his injury and resulting disability. Young App. 65a.

The matter went to trial in May, 1989.

The trial court charged the jury on the applicable law in accordance with the decision of this Court in *Scindia Steam Nav. Co. v. De Los Santos*, 451 U.S. 156 (1981). *See* Young App. 21a-25a.

After the jury had retired for its deliberations, it returned to the courtroom at about 8:30 p.m. reporting that it had not reached a decision. R. Vol. VII at 48. At that time no juror gave any indication that any other juror was acting improperly or deliberating in a biased or prejudiced manner.

At 10:30 p.m. the jury returned for the second time and returned its verdict, voting 9 to 2 in Mr. Young's favor, awarding $1.7 million in damages and holding defendant Ensidesa 85 per cent liable and defendant Arcasa 15 per cent liable. R. Vol. VII at 50-51.

The jury was polled and confirmed its verdict. Again, no juror voiced any objection to the manner of the deliberations or as to any prejudice or bias that had affected the jury's decision-making. R. Vol. VII at 51-54.

At no time subsequent to the jury's rendering its verdict did any juror approach the court with any comment regarding the manner of the deliberations.

Later, Ensidesa moved for a new trial and, in support thereof, attached an affidavit from one of the dissenting jurors. Ensidesa App. 81a-83a. Ensidesa subsequently supplemented this memorandum with two additional affidavits. Ensidesa App. 89a-91a, 92a-94a.

Ensidesa's position was that the affidavit testimony was sufficient to warrant the granting of a new trial. *At no time did Ensidesa request that the trial court hold an evidentiary hearing, and its motions for judgment notwithstanding the verdict and new trial were submitted to the court for decision after full argument in open court.*

Ensidesa and Arcasa both appealed from that judgment.[2]

The Louisiana Fourth Circuit Court of Appeal affirmed the judgment against both defendants, but reduced the plaintiff's award from $1,700,000 to $1,106,000 plus medical expenses. The court of appeal found Arcasa was entitled to complete contractual indemnity from Ensidesa. *Young v. Armadores de Cabotaje, S.A.*, 617 So. 2d 517, 545 (La. App. 4th Cir. 1993).

---

[2] Neither Arcasa nor Ensidesa have ever paid the judgment or posted bond for their various appeals. Arcasa is "defunct," but was covered by a policy of "reinsurance," which is alleged to be not subject to Louisiana's Direct Action Statute. LSA – R.S. § 22:655, *et seq.* Ensidesa still sells steel to United States customers, but claims it has no assets in this country subject to seizure and so is "judgment proof" in this country.

II.

SUMMARY OF ARGUMENT

Ensidesa contends that it was denied due process of law by the application of Louisiana Code of Evidence article 606B. Ensidesa is mistaken. The Louisiana Fourth Circuit Court of Appeal's decision is consistent with the decisions of this Court prohibiting the admissibility of testimony by jurors about jury deliberations to impeach the validity of a jury verdict. The jurors had ample opportunity to object to any bias or misconduct. The kinds of complaints made here against Juror Granderson's statements during deliberations have been consistently held inadmissible as competent evidence to impeach a jury verdict. Moreover, Ensidesa never asked the trial court to hold an evidentiary hearing on this issue, and should not now be heard to complain.

Arcasa seeks writs to correct what it perceives as a split in the United States Circuit Courts of Appeals concerning the duties owed by a vessel owner to a discharging stevedore. But the holding of the Louisiana Fourth Circuit Court of Appeal below does not present the conflict that Arcasa contends exists by reason of other United States Court of Appeals decisions.

For these reasons, the decision of the Louisiana Fourth Circuit Court of Appeal should not be disturbed.

III.

ENSIDESA'S WRIT APPLICATION SHOULD BE DENIED BECAUSE IT WAS NOT DENIED DUE PROCESS UNDER THE FOURTEENTH AMENDMENT BY THE APPLICATION OF LOUISIANA'S CODE OF EVIDENCE ARTICLE 606B.

Louisiana Code of Evidence article 606B, like its counterpart, Rule 606(b) of the Federal Rules of Evidence, prohibits a juror from offering testimony concerning jury deliberations to impeach the validity of a verdict.

In this regard, Louisiana Code of Evidence article 606B states as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether any outside influence was improperly brought to bear upon any juror . . . Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

After the verdict was rendered, counsel for Ensidesa, without leave of court, obtained the affidavits of three jurors concerning statements made by another juror, Mr. Granderson, during the course of the jury's deliberations.

Ensidesa states at page 12 of its Application for Writ of Certiorari that it requested a hearing before the trial

court on its motion for a new trial on the issue of juror misconduct, arguing, " 'This court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.' *Smith v. Phillips*, 455 U.S. 209, 215 (1982)." **But, in fact, Ensidesa at no time moved for an evidentiary hearing with regard to its allegation of juror misconduct. Ensidesa App., Motion for a New Trial, 71a-77a; 78a-80a; 84a-88a.** The trial court set Ensidesa's motion for a new trial for hearing (Young App. 26a), and a hearing was had in open court. Ensidesa did not attempt to call jurors to testify, choosing to rely upon the three affidavits it had submitted, which were, of course, not subject to cross-examination by respondent.

At the hearing on Ensidesa's motion for a new trial, the trial court considered the affidavits of the three jurors, but denied Ensidesa's motion.

On appeal, Ensidesa contended that the trial court had erred in refusing to grant its motion for a new trial because of the "evidence" of jury misconduct.[3] The court of appeal rejected this argument, holding the affidavits of these three jurors "as to matters or statements made by . . . [Mr. Granderson] during deliberations are clearly inadmissible to question the validity of the jury verdict." *Young*, 617 So. 2d at 534.

---

[3] Ensidesa first complained of an alleged failure to grant an evidentiary hearing in its writ of certiorari to the Louisiana Supreme Court (Ensidesa App. 107a), which writ was denied. *Young v. Armadores de Cabotaje, S.A.*, 625 So. 2d 171 (La. 1993).

Louisiana Code of Evidence article 606B, the trial court's reliance thereon to deny Ensidesa's motion for a new trial, and the court of appeal's decision are all entirely consistent with the decisions of this Court prohibiting the admissibility of testimony by jurors about jury deliberations to impeach the validity of a jury verdict. *McDonald v. Pless*, 238 U.S. 264 (1915); *Tanner v. United States*, 483 U.S. 107 (1987).

In *McDonald v. Pless*, 238 U.S. 264, the plaintiffs brought suit to recover $4,000 allegedly owed for legal services. After a trial, the jury returned a verdict in the plaintiffs' favor for $2,916. The defendant moved to set aside the verdict on the basis that the jury had not deliberated about the evidence, but rather had agreed to a quotient verdict by dividing what each of them individually thought the verdict should be by 12. Further, it was alleged that one juror had voted to give the plaintiff nothing and three had voted for $5,000, obviously more than the plaintiffs' demand. After the quotient was calculated, some jurors objected because of the inclusion of the three $5,000 votes, but, ultimately, the protesting jurors finally yielded to the argument that they were bound by the previous agreement, and the quotient verdict was rendered accordingly.

At the hearing on the motion to set aside the verdict, the defendant called to the stand one of the jurors who was sworn to testify as a witness. The trial court refused to allow the juror to testify on the grounds that he was "incompetent to impeach his own verdict." 238 U.S. at 266.

This Court was then called upon to decide whether the trial court had erred in refusing to consider the proffered testimony and whether the defendant had been

denied due process of law. In holding that the trial court had not erred and that the defendant was not entitled to relief, Your Honors reasoned as follows:

> [T]he weight of authority is that a juror cannot impeach his own verdict. The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.
>
> These two conflicting considerations are illustrated in the present case. If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private

> deliberation, the constant subject of public investigation – to the destruction of all frankness and freedom of discussion and conference.

238 U.S. at 267-68.

Your Honors went on to state that:

> [T]here might be instances in which such testimony of the juror could not be excluded without "violating the plainest principles of justice." This might occur in the gravest and most important cases; and without attempting to define the exceptions, or to determine how far such evidence might be received by the judge on his own motion, it is safe to say that there is nothing in the nature of the present case warranting a departure from what is unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict.

238 U.S. at 268-69.

The policy considerations underlying this Court's decision in *McDonald v. Pless* were ultimately codified in Rule 606(b) of the Federal Rules of Evidence, which provides as follows:

> Upon an inquiry into the validity of a verdict . . . a jury may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or

> whether any outside influence was improperly brought to bear upon any juror. . . .

This rule has been consistently interpreted by the courts to exclude any offer of testimony by jurors with respect to their internal deliberations for the purpose of setting aside their verdict. In *Tanner v. United States*, 483 U.S. 107 (1987), Your Honors refused to allow testimony concerning juror intoxication and marijuana and cocaine abuse that the defendant contended had deprived him of his Sixth Amendment guarantee of a "competent jury." This Court wrote as follows:

> [L]ong-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry. Petitioners' Sixth Amendment interests in an unimpaired jury, on the other hand, are protected by several aspects of the trial process. The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*. . . . Moreover, jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict. . . . Finally, after the trial a party may seek to impeach the verdict by non-juror evidence of misconduct. . . .
>
> In light of these other sources of protection of petitioners' right to a competent jury, we conclude that the District Court did not err in deciding, based on the inadmissibility of juror testimony . . . that an additional postverdict evidentiary hearing was unnecessary.

483 U.S. at 127 (citations omitted).

The seriousness of the allegations at issue in *Tanner* shows the great importance the Supreme Court has

attached to the policy of prohibiting postverdict intrusions into juror deliberations in the absence of information as to any *extraneous* or *outside* influence on their decision-making. Here, the allegations raised by the three juror affidavits are entirely directed at matters inherent in the jury's decision-making process and deliberation and in no way suggest that any "extraneous" or "outside" influence was brought to bear within the jury room to affect the jury's verdict.

Rather, it is alleged that the jury was corrupted by the presence and statements of Mr. Granderson, who argued for a higher verdict than others thought appropriate and supported his arguments in terms that some other jurors interpreted as being racist in favor of the plaintiff (who is black). One juror stated that, as the deliberations continued, she and others simply wanted to end the matter and thus agreed to a compromise with Mr. Granderson, in an amount greater than this juror otherwise believed was appropriate.

Allegations of jury bias were made in a criminal case, *United States v. Duzac*, 622 F.2d 911 (5th Cir. 1980), *cert. den'd*, 449 U.S. 1012 (1980). There, *during the course of deliberations*, the jury sent the court a note saying that, because of certain "prejudices" among the jury due to prior personal experiences, they were hung and could not reach a unanimous decision. The defendant moved for a mistrial, which the trial court denied. After the jury was instructed to continue the deliberation, they returned with a unanimous verdict *against the defendant*, who was black.

The court of appeal affirmed the verdict, reasoning as follows:

> [T]here is *no evidence that any external influence* was brought to bear on members of the jury. The prejudice complained of is alleged to be the product of personal experiences unrelated to this litigation. . . . Although the jury is obligated to decide the case solely on the evidence, its verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations.

622 F.2d at 913 (emphasis added).

In *Martinez v. Food City, Inc.*, 658 F.2d 369 (5th Cir. 1981), the defendant contended that a verdict against it should be set aside because of a juror affidavit stating that, during the deliberations, one juror said the defendant "should be taught a lesson." *Id.* at 372. The court of appeals refused to set aside the verdict, finding that this evidence was inadmissible and therefore there was "no competent evidence" to support a new trial. *Id.* at 374.

In *United States v. Casamayor*, 837 F.2d 1509 (11th Cir. 1988), *cert. den'd sub nom. Barker v. United States*, 488 U.S. 1017 (1989), a postverdict affidavit by one juror complained that the jury foreman had used "strong arm tactics." 837 F.2d at 1515. In rejecting the argument that this evidence should be admissible and competent to authorize a new trial, the Eleventh Circuit held that "the alleged harassment or intimidation of one juror by another would not be competent evidence to impeach the verdict under Rule 606(b) . . . " *Id.*

In *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 150 (3d Cir. 1975), *cert. den'd*, 424 U.S. 917 (1976), the Court held that "evidence of discussions among jurors, intimidation or harassment of one juror by another, and

other intra-jury influences on the verdict are within the [no impeachment] rule, rather than the exception, and is not competent evidence to impeach a verdict."

In *Shillcutt v. Gagnon*, 827 F.2d 1155 (7th Cir. 1987), the petitioner for *habeas corpus* relief, a black male, had been convicted of soliciting prostitutes. The government's chief witness against him was a young white woman. At trial, the jury had first deadlocked and then returned a guilty verdict after being urged to decide the case by the trial court.

The defendant sought to set aside the verdict based upon evidence that, during the jury's final deliberations, a white male juror had said, "Let's be logical. He's black and he sees a seventeen year old white girl – I know the type." 827 F.2d at 1156. The trial court denied the defendant's request for relief, and the Wisconsin Court of Appeal affirmed the judgment, holding that the statement of the juror during jury deliberations was not competent evidence to set aside the verdict. *State v. Shillcutt*, 341 N.W.2d 716 (Wis. App. 1983). The Wisconsin Supreme Court affirmed. *State v. Shillcutt*, 350 N.W.2d 686 (Wis. 1984). The defendant then sought *habeas* relief in the federal court, arguing that the racist comment made during jury deliberations violated his constitutional rights under the Sixth and Fourteenth Amendments. In rejecting this argument, the Seventh Circuit Court of Appeal noted that its role was to "inquire whether the state court determination violated any federal constitutional or statutory right of the petitioner." 827 F.2d at 1158. The Court concluded that, even in this context, "applying the no-impeachment rule does not offend fundamental fairness." *Id.* at 1160.

These cases clearly establish that the kinds of complaints made here against Juror Granderson's statements during deliberations have been consistently held inadmissible as competent evidence to impeach a jury verdict.

There is nothing about this case to suggest that this defendant was denied fundamental fairness and due process by the application of this rule here. No juror objected about bias before a verdict was rendered when there was opportunity to do so before the Court. No juror objected about misconduct when the jury was polled at the time the verdict was rendered. The statements were made later only after the dissident jurors were contacted by counsel for the defendant.

Moreover, the affidavits presented, even if considered, fall far short of establishing by clear and convincing evidence either that Mr. Granderson was racially biased or that racial bias prejudiced the jury's verdict against Ensidesa.

According to the jurors' affidavits, Mr. Granderson wanted to award Mr. Young more than $2,000,000. Given the extraordinary severity of Mr. Young's injuries, it simply cannot be said that Mr. Granderson's views must have been animated solely by bias favoring Mr. Young.

Finally, Ensidesa complains that no hearing was held on its motion for a new trial. This is patently untrue. A lengthy hearing was held. No new evidence was introduced at the hearing, but no evidentiary hearing was requested. There is nothing in Louisiana law that prohibited Ensidesa from requesting such a hearing or subpoenaing the jurors. Ensidesa simply chose not to do so.

In *Tanner*, 483 U.S. 107, Your Honors, in response to a similar complaint, held that the "District Court did not err in deciding, based on the inadmissibility of juror testimony and the clear insufficiency of the nonjuror evidence offered by petitioners, that an additional postverdict evidentiary hearing was unnecessary." 483 U.S. at 127. Here, Trial Judge Johnson was not even asked to hold such a hearing.

Similarly, in *United States v. Duzac*, 622 F.2d 911, the Fifth Circuit held that the defendant in that criminal proceeding had no constitutional right to an evidentiary hearing on his complaints of jury misconduct since "the only questions that the trial judge might have asked at a hearing would have concerned the jurors' prejudices and, therefore, would have been impermissible." 622 F.2d at 914. This is exactly the same situation that existed here. Even if the trial court had been asked to hold an evidentiary hearing, it would have been error to grant it in the circumstances of this case.

In conclusion, Louisiana's evidentiary rule (virtually identical to Federal Rule of Evidence 606(b)) prevents impeachment of a jury's verdict by evidence of the jury's alleged improper deliberations, regardless of whether such evidence suggests bias, intimidation, or compromise. The narrow question presented by Ensidesa's writ application is whether Louisiana's use of its evidentiary rule here violated the defendant's right to due process. Given the allegations made, the ample opportunities available to the jury to object to bias if they had seen fit, and the settled precedent of this court, we respectfully suggest that the answer is "NO" and that Ensidesa's writ of certiorari should be denied.

IV.

ARCASA'S WRIT APPLICATION SHOULD ALSO BE DENIED.

A. The holding below does not conflict with *Derr*[4] as properly interpreted.

Arcasa correctly states that the Fifth Circuit in *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1983), *Harris v. Flota Mercante Grancolumbiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), and *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. den'd*, 493 U.S. 1050 (1990), and the Ninth Circuit in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. den'd*, 459 U.S. 967 (1982), and *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993), have clearly held that the vessel owner's 905(b) obligation of reasonable care under the circumstances applies to the ship and its work spaces and that under appropriate circumstances this duty may apply to a dangerous condition in stowed cargo that longshoremen must off-load.[5] The Louisiana

---

[4] *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), *cert. den'd*, 486 U.S. 1007 (1988).

[5] Trial Judge Johnson charged the jury, in pertinent part, as follows:

> The shipowner and charterer of the vessel may be liable for a negligently stowed cargo which causes injury where the shipowner or charterer knew or should have known of the dangerous condition . . .

Young App. 23a.

The record reflects that during the charge conference Ensidesa stated that the charge was "superfluous." Young App 2a. Later, Arcasa simply stated that it objected to plaintiff's

Fourth Circuit's decision is certainly consistent with these decisions, as Arcasa allows.

We part with Arcasa's insistence that the decision below is clearly in conflict with the United States Third Circuit's interpretation of the vessel owner's duties under 905(b) in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490.

The *Derr* opinion can arguably be construed in two ways, as petitioner Arcasa implicitly acknowledges: (1) broadly, that the vessel owner, despite its failure to exercise reasonable care, may not be found liable for harm caused by dangers arising from cargo because it has no legal duties with respect thereto; or (2) narrowly, that a vessel owner owes a duty of care but can be found liable only if it is shown that its own conduct caused or contributed to the dangerous condition or it had actual knowledge of a dangerous condition.

The first construction (no duty) is refuted by the *Derr* court's holding that "there is no *general* duty on the part of a vessel to supervise or inspect the work of stevedores" and that a vessel owner "can be *deemed* negligent towards a longshoreman injured because of improperly stowed cargo *only if the vessel has breached one of the limited*

---

requested jury charge No. 5 without stating any reasons for the objection. Young App. 19a.

Neither statement is a sufficient objection as a matter of Louisiana law to preserve for appellate review an objection to the court's instructions, which, obviously, were not plainly erroneous. Louisiana Code of Civil Procedure article 1793; *Coody v. Richardson*, 569 So. 2d 1012, 1017 (La. App. 3d Cir. 1990), *cert. den'd*, 572 So. 2d 90 (1991).

duties referred to in Scindia." 835 F.2d at 497. (Emphasis added.)

This is hardly a holding of *no duty* under any circumstances with respect to dangers arising from stowed cargo.

But beyond the words of the *Derr* opinion itself, a "no duty" construction is inconsistent with the vessel's duty of due care imposed by 905(b) as interpreted in *Scindia*. For example, were danger in the cargo the result of the vessel having run aground, or of the captain's instructions, or of vessel crew conduct, liability could certainly be imposed.

Finally, the Third Circuit in *Kirsch v. Plovidba*, 971 F.2d 1026 (3d Cir. 1992), has itself narrowed some of the broad dicta in *Derr*. In *Derr* the court stated, "if the danger in the cargo was indeed readily apparent . . . there can be no liability under *Scindia*," 835 F.2d at 497; but in *Kirsch*, it more narrowly stated that "a shipowner may be negligent for failing to eliminate an obvious hazard that it could have eliminated, but only when it should have expected that an expert stevedore could not or would not avoid the hazard and conduct cargo operations reasonably safely." 971 F.2d at 1031. *See also* discussion at 1031 nn.6-7.

If Your Honors agree that the *Derr* court's "no duty" analysis is subject to clear exceptions that avoid, for example, immunizing vessel employee conduct with respect to stowed cargo, then there is no conflict in fact with the Louisiana decision below.

Here, the evidence showed that Arcasa was a co-participant with Ensidesa in causing and permitting the manner of stow that the jury found presented an unreasonable danger to the off-loading stevedore, and the court of appeal specifically found that *"ARCASA's conduct contributed to plaintiff's accident and resulting injuries."* *Young*, 617 So. 2d at 528. (Emphasis added.)

Accordingly, the holding of the Louisiana Fourth Circuit is not in conflict with a proper reading of the holding of the United States Third Circuit in *Derr*, and Jerry Young respectfully asks that petitioner Arcasa's writ of certiorari be denied.

B. Granting this writ would not serve the interests of uniformity.

Arcasa urges that Your Honors should grant certiorari in the interest of "uniformity" of the maritime law.

Here, both the trial court and the court of appeal followed the clear precedents in the United States Fifth Circuit Court of Appeal, in which they sat, *Lemon*, 656 F.2d 110; *Harris*, 730 F.2d 296.

By so doing, the Louisiana courts properly adhered to the principle of uniformity in the application of general maritime law. Arguably, were state courts free to adopt interpretations different from those of the federal circuit in which they sit, uniformity would be utterly destroyed and forum shopping would be the rule. Moreover, this court's work load would be significantly increased because in addition to having to periodically

resolve conflicts of maritime law among the federal circuit courts, Your Honors would necessarily have to also referee and resolve conflicting interpretations of maritime law between state and federal courts and even conflicts between appellate courts in the same state.

Were Your Honors to grant Arcasa's writ and hold that the trial and appellate courts should have followed a broad reading of *Derr* and should have disregarded *Lemon* and *Harris*, the decision, paradoxically, would invite, in the long run, a result that is the opposite of that intended. Accordingly, Jerry Young respectfully requests denial of Arcasa's petition.

C. Your Honors should refuse to grant the writ because the Louisiana Fourth Circuit Court of Appeal properly interpreted the duties owed under 33 United States Code section 905(b) and found that there was sufficient evidence to support the jury verdict.

In *Scindia*, 451 U.S. 156, Your Honors, citing *Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404, 415 (1969), defined the "turnover" duty of a vessel owner, vis-a-vis longshoremen who must board the vessel to undertake cargo operations, as follows:

> [T]he vessel owes to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances." This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons

> and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman.

Scindia, 451 U.S. at 166-67 (citation omitted).

As the Ninth Circuit in *Turner*, 651 F.2d 1300, and *Riggs*, 8 F.3d 1442, has suggested, there are especially strong policy reasons to avoid immunizing the vessel owner from the duty of due care with respect to cargo where the on-loading is done by a foreign loading stevedore not subject to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, and not subject to the comprehensive scheme of federal regulations governing longshore operations.

The Ninth Circuit in *Riggs* began with an appreciation of Congress's intent in enacting the 1972 amendments to the Longshore and Harbor Workers' Compensation Act. In this regard, it cited the House Report, 1972 U.S.C.C.A.N. at 4704, which concluded as follows:

> Permitting actions against a vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

8 F.3d at 1444.

With this understanding of congressional intent in mind, the Ninth Circuit explained its view that a vessel owner may be held liable if it negligently fails to correct dangerous conditions arising from the loading of cargo by a foreign stevedore, reasoning as follows:

> *Turner*'s holding that the turn over duties of safe-condition and warning encompass non-obvious dangerous conditions in stowed cargo rested on our conclusion that such a rule would further the Congressional goal of safety that underlies the LHWCA. We reasoned that neither the off-loading longshoreworker nor his stevedore-employer could exercise any control over the on-loading foreign stevedore. Only the vessel could do so, by choosing a reliable foreign stevedore, supervising its work when necessary, and correcting concealed dangers or warning the off-loading stevedore of them. Moreover, we noted that in many cases, the injured worker could not sue the foreign stevedore, who would be beyond the reach of the processes of a federal district court. All of these factors are equally applicable in the case of an open and obvious cargo defect.

> We noted in *Turner* another factor that is also equally applicable to both types of *cargo defects*. We recognized that section 905(b) does not bar a shipowner from recovering against a foreign stevedore, who is not an "employer" within the meaning of the LHWCA, where the stevedore is primarily at fault for the off-loading longshoreworker's injuries. As we recently stated in *Carpenter v. Universal Star Shipping SA* [924 F.2d 1539, 1544 (9th Cir. 1991)], where we reaffirmed our holding and reasoning in *Turner*: "The prospect of vessel-initiated actions against foreign stevedores provides foreign stevedores with an incentive to do their work carefully."

8 F.3d at 1446.

This analysis is especially persuasive under the particular facts and circumstances here since (1) the dangerous condition caused by the foreign on-loading stevedore did not create any risk of harm to them (and therefore they had no incentive to correct it), but did create a significant risk of harm to those longshoremen who would have to off-load the cargo; (2) the on-loading stevedore, Ensidesa, had a dual role since it was also the vessel's charterer; (3) the off-loading longshoremen had no practical alternative to avoid the danger; and (4) the vessel owner was a co-participant in causing and permitting the dangerous condition. This is not like a situation wherein the foreign stevedore spills oil in the hold, presenting a danger to itself as well, which an off-loading stevedore could later simply repair or avoid, and which the vessel had no role in causing.

Finally, here, the jury agreed that the on-loading stevedore/charterer, Ensidesa, was in fact primarily

responsible for the hazard and therefore found Ensidesa 85 per cent at fault and Arcasa 15 per cent at fault. Though the two parties were held solidarily liable to the plaintiff, the court of appeal held that, under the contractual relationship that existed between them, Arcasa had full indemnity against Ensidesa, not only for its liability to the plaintiff, but for its attorney fees as well.

This allocation of fault by the Louisiana courts fully accords with the basic policies providing the underpinnings of Your Honors' decision in *Scindia*, 451 U.S. 156. For that reason as well, we urge that Your Honors refuse to grant Arcasa's writ of certiorari.

V.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari to the Louisiana Fourth Circuit Court of Appeal should be denied.

Respectfully submitted,

LAWRENCE S. KULLMAN (#7884)
LEWIS & KULLMAN
2615 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: 504/588-1500

FREDERICKA HOMBERG WICKER (#6977)
434 Bellaire Drive
New Orleans, Louisiana 70124
Telephone: 504/482-1887

No. 93-1040 and No. 93-1068

In The

Supreme Court of the United States

October Term, 1993

NO. 93-1040

EMPRESA NACIONALE SIDERURGICA, S.A.,

Petitioner,

versus

JERRY YOUNG,

Respondent.

NO. 93-1068

ARMADORES de CABOTAJE, S.A.,

Petitioner,

versus

JERRY YOUNG,

Respondent.

Petitions for Writs of Certiorari to the Louisiana Fourth Circuit Court of Appeal

APPENDIX TO RESPONDENT'S BRIEF

APPENDIX CONTENTS

Page

Record, Vol. VII, p. 1 ..... 1a

Record, Vol. VII (Jury Charge Conference) April 25, 1989, at 93-113 ..... 2a

Record, Vol. VII, p. 1 ..... 20a

Record, Vol. VII (Jury Charges), April 26, 1989, at 29-35 ..... 21a

Civil District Court for the Parish of Orleans Order setting Ensidesa's post-trial motions for hearing 26a

Civil District Court for the Parish of Orleans Order setting Arcasa's post-trial motions for hearing 28a

Original Brief of Appellee, Jerry Young, 90-CA-1107, Fourth Circuit, December 10, 1990 ..... 30a

CIVIL DISTRICT COURT

PARISH OF ORLEANS

STATE OF LOUISIANA

JERRY YOUNG — NO. 84-17780

VS — DIVISION "I"

ARMADORES DE CABOTAJE, S.A. AND K&B EQUIPMENT COMPANY

Testimony and notes of evidence, taken in the above-entitled, cause, before the HONORABLE BERNETTE J. JOHNSON, Judge Presiding, on the 25th day of April, 1989.

APPEARANCES:

MS. FREDERICKA HOMBERG WICKER
Representing the Plaintiff

GERARD T. GELPI, ESQ.
BRIAN THOMPSON, ESQ.
Representing ARCASA

MILES P. CLEMENTS, ESQ.
ANDREW S. DE KLERK, ESQ.
Representing ENSIDESA

Reported by:

Barbara A. Burger
Certified Shorthand Reporter

(DISCUSSION OFF THE RECORD).

THE COURT:

Number four.

MR. DEKLERK:

Four is okay if we add in the rest of the paragraph.

THE COURT:

I'll give the entire statement from Lemon against Bank Lines. Number five.

MR. DEKLERK:

I would merely say this is superfluous.

MS. WICKER:

No, it is not. It states that the shipowner and charterer may be liable for negligently stowed cargo which causes injury. That's what this case is about.

THE COURT:

I'll give five. Six, obvious dangers.

MR. DEKLERK:

We would submit that this doesn't apply to a charter. Secondly, ENSIDESA wasn't there; and thirdly, I don't think this applies to the facts.

MR. GELPI:

We don't believe it applies to the facts.

MS. WICKER:

Throughout the trial questions were asked of every longshoreman who took the stand about you didn't complain, you didn't do this, you didn't do that alluding to a duty by the longshoreman to leave their job –

THE COURT:

I'll give it. Number seven.

MR. DEKLERK:

I would have the same objection. There was no evidence of any complaints. That's precisely the point.

MS. WICKER:

They were asked and it was eluded they should have.

THE COURT:

I'll give seven. I'll give eight. Objections to eight.

MR. DEKLERK:

Yes. this comes from a case involving Section 933 of the Act and furthermore we are being sued as the loading stevedore under the general maritime law. I would submit that comparative fault is the root that applies to us.

MS. WICKER:

I gave the Court a memorandum with respect to the Cooper T. Smith question generally speaking and the law is that the shipowner may not assert Cooper T. Smith negligence as a defense and I site [sic] to you Edmonds v. Compagnie –

MR. GELPI:

I think the way it's worded may not assert the defense. We didn't do anything wrong and Cooper did it all.

THE COURT:

I think in the 933 action it is a comparison of fault as between the vessel and the longshoremen. That seems to be the reading of Hartford Accident and Indemnity Company against Ocean Carrier.

MS. WICKER:

This is not a 905 B action.

THE COURT:

I remember we using this case. If this action says under 933 the comparison of fault is as fault, negligence as it relates to the vessel or to the longshoreman –

MS. WICKER:

Maybe that's an improper cite. Maybe that's not the proper case.

THE COURT:

Let's leave that. Let's leave eight. That takes us to nine.

MR. DEKLERK:

I would submit that the test for loading stevedore is simply one of ordinary negligence under the circumstances. There are no cases which specifically state what that test is.

THE COURT:

The charge seems to say that the onloading stevedore has a duty of reasonable care but then I think it implies too much when it says that the duty was that the cargo should be properly stowed and properly separated with adequate dunnage. I'll exclude nine.

MS. WICKER:

Could we limit nine?

THE COURT:

We will exclude nine. Ten. This is all right in the general charges. I admit ten.

MS. WICKER:

One other thing the question of prejudgment interest, I don't know how we are going to resolve it. If we do resolve it and it goes to the jury – I guess we ought to go to the jury.

THE COURT:

They need to argue against the – including seven in the interrogatories. We will do it in that fashion.

MS. WICKER:

And then I give you a charge if you decide it goes to the jury –

THE COURT:

Do you have one prepared?

MS. WICKER:

Yes.

THE COURT:

Okay. Let's pass that at the moment.

MS. WICKER:

One other question was with regard to Workmen's – the longshoremen comp. I thought the Court was gong to address that. I didn't seek to address it myself. Whatever the Court wants to say.

THE COURT:

About the fact that Mr. Young has been compensated under the Longshoremen Harbor Workers Act with compensation benefits and they need not consider?

MS. WICKER:

Would you add something to that so that it will take care of that if they think he has already gotten money. They can think the Court will do whatever the Court thinks they need to do.

MR. CLEMENTS:

Also there should not be a suggestion he will not get future comp under the act. It's a question of past and future comp.

MS. WICKER:

But he doesn't get future comp until they get credit for this recovery so it all washes out.

THE COURT:

Now let's see where we are. With regard to the – that takes care of the plaintiffs requested charges. Let's go onto defendants. ARCASA, ENSIDESA, which one first: Let's take ARCASA first.

MR. GELPI:

Maybe we should try go to ENSIDESA first.

THE COURT:

The revised special jury charges dated April 25; is that right, let's start number one.

MS. WICKER:

With regard to number one paragraphs two and three are like plaintiffs charge one are more in the nature of their argument and the rest of it is already given in plaintiff's charge number two with a direct quote and, therefore, two or three I guess is covered by plaintiffs three since that's what the defense –

THE COURT:

I'll give jury charge one and paragraph one only, jury charge two and paragraph one only.

MS. WICKER:

Can I ask with regard to charge one on paragraph one can we just knock out only have and put ENSIDESA need exercise ordinary care instead of need only exercise ordinary care.

MR. DEKLERK:

I think that's precisely the point. That's what ENSIDESA has to do. They only have to exercise ordinary care.

MS. WICKER:

Those are unnecessary adjectives.

THE COURT:

I'll leave it all in.

MR. GELPI:

We can agree with our charges covered by ENSIDESA and that ENSIDESA and ARCASA be added.

THE COURT:

Okay.

MS. WICKER:

With regard to jury charge number two that's an improper statement of the law. That refers to Scindia category three case. This is a Scindia category one case.

THE COURT:

We are back as to whether the hazard was seen before the unloading or whether it developed during the course of the operation.

MS. WICKER:

The problem is that the defense would like to have law before the jury. Once you start, then their original duty goes away and that's what this charge alludes to and it's bad law. The Lemon case speaks contra to this. The Harris case speaks contra to this. I object. I think it's an improper statement of the law.

MR. GELPI:

I think that's what we just read from Lemon.

THE COURT:

I'll give two.

MS. WICKER:

Number three is addressed in plaintiffs charge number three as well as plaintiffs number four by direct quotes to the cases.

THE COURT:

Which one do you want?

MR. DEKLERK:

We would like four.

MS. WICKER;

No. I'm saying their charge three equals my charges three and four that you have already ruled on.

THE COURT:

This one three and four speak to the safety of the equipment. I don't know if we have that yet.

MR. DEKLERK:

Charge four has to do with opening arguments and that's very important evidence of the case and the applicable law.

THE COURT:

Let's give three paragraph one. Only the Court will give charge four paragraph one only. that takes us to five.

MS. WICKER:

Note my objection to this.

THE COURT:

I don't think we need five. We have already given that in some fashion. Omit five. This talks about the negligence of Cooper.

MS. WICKER:

I don't think the negligence of Cooper has any place in this case but also I believe that Scindia does not say that there is a duty on the part of the offloading stevedore to inspect.

MR. DEKLERK:

I think this comes directly from the Scindia wording.

THE COURT:

Prior to beginning operations.

MS. WICKER:

It's the owners duty to provide the offloading stevedore with a reasonably safe cargo which expert stevedores can offload with the use of reasonable care.

MR. GELPI:

I think the last part of what counsel said is maybe a correct statement.

THE COURT:

I'm inclined to give this charge and eliminate all the others that touch on it. The vessel owes to the stevedore and his longshoremen employees a duty of exercise and due care under the circumstances. This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able to by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care that would likely be encountered by the stevedore in the course of his cargo operations and are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. The shipowner thus has a duty with respect to the conditions of the ship's gear, equipment, tools and work space to be used in the stevedoring operations and if he fails to warn the stevedore of hidden danger which would have been known to him and in the exercise of reasonable care he has breached he [sic] duty and is liable if his negligence causes injury to a longshoreman. What does that eliminate?

MS. WICKER:

Six, seven, nine, ten, eleven, that far back.

THE COURT:

All of these came from Scindia.

MR. DEKLERK:

Yes. Seven is from Helaire.

MS. WICKER:

I think the balance of these charges are covered by the charge you just read.

THE COURT:

We have omitted five. We are on six again.

MR. DEKLERK:

The ship owner within limits is –

THE COURT:

Okay. I have it. I'll give that charge.

MS. WICKER:

That would be instead of six.

THE COURT:

Yes. I'll omit six and we will give the language: the shipowner within the limits is entitled to rely on the stevedore who owes no duty to the longshoreman to inspect or supervise the cargo operations.

Now we are on seven.

MS. WICKER:

With regard to seven I object to the charge in total because I don't think it has anything to do – again just for purposes of objection the category one case which this is more specifically with regard to paragraph two, that's not a statement of law. That's argument.

THE COURT:

I'll omit seven. I think it will be clear as to the duties of shipowner and the charterer of the vessel.

MR. GELPI:

For the record ARCASA strongly objects to the omission of the charge. We think it's in detail and shouldn't be omitted.

THE COURT:

I think it works both ways. We are trying to give the jury the understanding it's up to them to decide whether the dangerous condition existed at the beginning of the offloading operations or whether it developed subsequent to the beginning of the operations and so to limit the duty in some fashion of a vessel owner might confuse the jury.

MR. GELPI:

I think the law as stated in Helaire and jury charge number seven is clear. As I appreciate it, it's a matter of law if a competent stevedore felt that a condition although dangerous was within the province of his men to unload it even though it was dangerous. If he judged it safe enough, the vessel owner is exonerated from liability. I think that's the law. That's the basis for my objection. I'm not trying to say what this case holds. I think that's the law.

MR. DEKLERK:

This is a quote from the case.

MS. WICKER:

I strongly object to giving it.

THE COURT:

I guess we are reading seven. Nine is a little bit similar.

MS. WICKER:

I don't mind nine. I think that nine is an accurate statement. I would love not to have it but I think it's an accurate statement of the law. I don't think it applies to this case. Given your ruling if you are saying the jury gets to decide whether it's something that helped in the confines of cargo operations.

THE COURT:

So we will give nine. We are back to seven.

MS. WICKER:

I think seven is not an accurate statement of the law that applies to this case. I think any statement in that regard is covered by the general Scindia charge you intend to give and further I kind of gave up on nine because it basically talks about the same sort of thing and so seven is duplicitous.

MR. GELPI:

The key to plaintiffs argument is seven isn't a correct statement of the law. Whether it applies to this case, that's for the jury to decide.

THE COURT:

It does say in the footnote the owners actual knowledge of a dangerous condition which later injured a longshoreman would not in itself make the owner negligent. It might well be reasonable for the owner to rely on the stevedores judgment that the condition though dangerous was safe enough.

MS. WICKER:

The problem is that the Helaire case addresses a condition that came into existence once offloading had begun. That's not where we are.

THE COURT:

Let's strike all the language in seven and put this in. I better say owner or charterer. Instead of seven the charge will read actual knowledge of a dangerous condition by the owner or charterer of the vessel which dangerous condition later injures a longshoreman would not in itself make the owner or charterer of the vessel negligent. It might well be reasonable for the owner or charterer to rely on the stevedores judgment that the condition though dangerous was safe enough. That takes us to eight.

MS. WICKER:

I think you just covered that.

MR. GELPI:

I will concede eight is probably included in that.

THE COURT:

Nine, that's the same thing.

MS. WICKER:

Right, we did nine. Now we are on ten.

MR. DEKLERK:

I would like to add in the word might develop on nine.

THE COURT:

Let's just add in ENSIDESA and ARCASA had no duty to discover danger conditions that developed. We are on ten.

MS. WICKER:

I don't have any objection to ten.

THE COURT:

11.

MS. WICKER:

I don't think 11 has anything to do with this case.

THE COURT:

We will omit 11.

MS. WICKER:

Number 12 they site [sic] no case law.

THE COURT:

That's general law. I'll give 12.

MS. WICKER:

On 13 I only have an objection to a couple of words in paragraph two where it says at line – at the end of line five and beginning of line six even in the slightest degree I would like to have that omitted and again at the end where it says Jerry Young's negligence contributed to his own injury. I would like to have it changed to make it balanced. You may find he was not negligent at all or he was negligent to the extent of one percent to a hundred percent.

THE COURT:

I think this is balanced.

MS. WICKER:

As to charge number 14 this addresses assumption of the risk which is – with regard to 905 B cases has been excluded specifically by the Scindia case.

THE COURT:

We will omit it.

MR. DEKLERK:

Naturally we take a contrary position.

THE COURT:

That takes care of the defendants revised special jury charges. Let's go onto ARCASA charges.

MS. WICKER;

Defendants charge number nine is the same as ARCASA charge number one.

THE COURT:

I'll give one. We will omit one. Let's look at two.

MR. GELPI:

We are going to delete number two.

THE COURT:

Three, let's pass three. I'll give four. We will omit five, omit six, omit seven, omit eight, omit nine, omit ten, we will give 11, omit 12, omit 13. We will give 14. We will give 15, omit 16, omit 17, omit 18, omit 19, omit 20, omit 21, omit 22, omit 23. Let's give 24 – no, let's omit 24. I'll give 25. We will omit supplemental number one. Two, omit; three, I'll give three. I'll give four. Let's omit five, omit six. We will give seven.

MR. GELPI:

Can I make for the record my objections.

THE COURT:

This is in reference to the proposed jury interrogatories submitted on behalf of ARCASA. These are dated April 10, 1989 and the supplemental jury charges dated April 17, 1989.

MR. GELPI:

ARCASA would object to the failure of the Court to give its original charge number six, original charge number seven, and then with respect to its supplemental charges ARCASA has no objections and it's satisfied with the Court's decision based on the duplications that we have discussed.

With respect to ENSIDESA's charges I think I stated my objections when those were covered. I did not state my objection with respect to plaintiff's charges and I won't argue at this time. We object to the Court's giving charge – plaintiffs charges five, six, seven and eight.

MR. DEKLERK:

We would do the same thing.

THE COURT:

We are dealing only with the defendant revised special jury charges dated April 25, 1989; is that right?

MR. DEKLERK:

That's correct. We would object to Your Honor's failure to include . . .

R. Vol. VII at 93-113.

CIVIL DISTRICT COURT

PARISH OF ORLEANS

STATE OF LOUISIANA

JERRY YOUNG — NO. 84-17780

VS — DIVISION "I"

ARMADORES DE CABOTAJE, S.A. AND K&B EQUIPMENT COMPANY

Testimony and notes of evidence, taken in the above-entitled, cause, before the HONORABLE BERNETTE J. JOHNSON, Judge Presiding, on the 26th day of April, 1989.

APPEARANCES:

MS. FREDERICKA HOMBERG WICKER
Representing the Plaintiff

GERARD T. GELPI, ESQ.
BRIAN THOMPSON, ESQ.
Representing ARCASA

MILES P. CLEMENTS, ESQ.
ANDREW S. DE KLERK, ESQ.
Representing ENSIDESA

Reported by:

Barbara A. Burger
Certified Shorthand Reporter

by the Court. You must not reduce the amount of past wages to which you find Mr. Young is entitled by the fact that he has collected certain amounts in Worker's Compensation benefits. I'm saying to you that you may not reduce any amount you find he is entitled to in past wages on account of the fact that he has collected Worker's Compensation benefits, is that clear?

The vessel owes to the stevedore and his longshorerman employees a duty of exercising due care under the circumstances. This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert, an experienced stevedore will be able to by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care. Such conditions must be made known if they are likely to be encountered by the stevedore in the course of his cargo operations, and if they are not known to the stevedore they must be made known to him by the vessel owner except that where they are open and obvious the vessel owner may expect that the stevedore would reasonably anticipate those and they expect that the stevedore would be reasonably competent in the performing of his work and unloading a vessel such as the one involved in this instance.

The shipowner thus has a duty with respect to the condition of the ships gear, equipment, tools and the work space to be used in the stevedoring operations. If the shipowner fails at least to warn the stevedore of

hidden dangers which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman.

The vessel may be liable if the vessel fails to exercise due care to avoid exposing the longshoreman to harm from hazards that may be encountered in areas or from equipment under the active control of the vessel during the stevedoring operations.

As a general rule the shipowner may rely on the stevedore to avoid exposing the longshoreman to unreasonable hazards. This is because the federal statutes require the stevedore which is the longshoreman's employer to provide a reasonably safe place to work and to take safeguards with respect to equipment and working conditions.

In this case the plaintiff Mr. Jerry Young is seeking damages from ARCASA and ENSIDESA for personal injuries sustained on November 22nd, 1982 while he was working as a longshoreman for Cooper Stevedoring aboard the M/V LORENA.

Plaintiff claims that the defendants acting through their agents and/or employees were negligent and that such negligence was a proximate cause of this accident and injury. The vessel owner and charterer owed the stevedore and his longshoreman employes [sic] a duty of exercising due care under the circumstances.

MR. DE KLERK:

I think you already read that.

THE COURT:

Let's omit that. In this case ARCASA and ENSIDESA would be responsible for eliminating dangerous conditions which exist at the outset of the stevedoring operations but ARCASA and ENSIDESA would have no duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations. It is a stevedore who must see to the safety of cargo operations. The shipowner and charterer of the vessel may be liable for a negligently stowed cargo which causes injury where the shipowner or charterer knew or should have known of the dangerous condition, that a danger is open and obvious is not necessarily a complete defense to a longshoreman's suit.

If the longshoreman's only alternatives would be to leave his job or face trouble for delaying the work, thus a longshoreman's own knowledge of shipboard hazard will not negate a shipowner's duty of care which would otherwise exist.

The law does not require the longshoreman or stevedore to request remedial action in order to recover from the shipowner for injuries due to a dangerous condition within the shipowner's control.

Under the law ENSIDESA and ARCASA need only have exercised ordinary care under the circumstances to provide a vessel that expert and experienced stevedores would be able to by the exercise of reasonable care to perform the operations with reasonable safety to persons and property.

The primary responsibility for the safety of Mr. Young rested upon Cooper Stevedoring. Under the law ENSIDESA and ARCASA would be entitled to rely on Cooper not to expose its employees to unreasonable hazards and ENSIDESA and ARCASA would have no duty to anticipate the action or inaction of a careless stevedore or to anticipate negligence on their part or to supervise them.

Before turning the vessel over to stevedore Cooper, ENSIDESA and ARCASA had the duty to exercise ordinary care under the circumstances, to have the ship and its equipment in such condition that an expert stevedore could unload the vessel and the cargo safely. ENSIDESA and ARCASA are only under a duty to warn the stevedores of hidden dangers in the vessel and its equipment of which by the exercise of reasonable care they should have been aware.

This duty is not breached if the dangerous condition is an open and obvious one and the longshoreman could see. An obvious defect should be as apparent to the stevedore and its longshoreman employees as to ENSIDESA and ARCASA.

The shipowner and the charterer of the vessel within limits would be entitled to rely on the stevedores and owes no duty to the longshoreman as I said to inspect or supervise the cargo operations.

Once the longshoreman employees of Cooper began working, ENSIDESA and ARCASA had no general duty under the law to discover a dangerous conditions [sic] that developed within the confines of the stevedores operation.

Actual knowledge of a dangerous condition by the owner or charterer of the vessel which condition later injured a longshoreman would not in itself make the owner or charterer of the vessel negligent. It might well be reasonable for the owner or charterer to rely on the stevedores judgment that the condition though dangerous was safe enough.

The shipowner or charterer is not responsible for the negligence of the stevedore or its employees such as the flagman or crane operator. In other words, ARCASA and ENSIDESA are not responsible for the negligence of Cooper or Cooper employees. The shipowner or charterer itself must be actually at fault and that fault must be the proximate cause of the plaintiff's injury.

The plaintiff is under a legal obligation to mitigate his damages. In other words, he is obligated to seek employment if he can. If you find for plaintiff, any award you make should be reduced by the amount that he could have earned in the past and what he can earn in . . .

R. Vol VII at 29-35.

CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 84-17780 DIVISION "L" DOCKET NO. 4

JERRY YOUNG

VERSUS

ARMADORES de CABOTAJE, S.A. and
K&B EQUIPMENT COMPANY

FILED; _____ _____
DEPUTY CLERK

ORDER

PLEASE TAKE NOTICE that the Motion of Empresa Nacional Siderurgica, S.A. for Judgment Notwithstanding the Verdict and the Alternative Motion for a New Trial will be heard by the Court on Friday, June 16th, 1989 at 9:00 o'clock a.m., or as soon thereafter as counsel may be heard.

New Orleans, Louisiana this 30th day of May, 1989.

/s/ Bernette J. Johnson
DISTRICT JUDGE

PLEASE SERVE:

Mr. Jerry Young
through his attorney

Ms. Fredericka H. Wicker
LEWIS & KULLMAN
2615 Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130

Arcasa through its attorney

Mr. Randall C. Coleman, III
GELPI, SULLIVAN, CARROLL & LABORDE
430 Notre Dame Street
New Orleans, Louisiana 70130

CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 84-17780 DIVISION "L" DOCKET NO. 4

JERRY YOUNG

VERSUS

ARMADORES de CABOTAJE, S.A. and
K&B EQUIPMENT COMPANY

FILED; _____ _____
DEPUTY CLERK

ORDER

The Motion of Armadores de Cabotaje, S.A. for Judgment Notwithstanding the Verdict or Alternatively for New Trial will be heard by the Court on Friday, June 16th, 1989 at 9:00 o'clock a.m., or as soon thereafter as counsel may be heard.

New Orleans, Louisiana this 30th day of May, 1989.

/s/ (sgd) Bernette J. Johnson
JUDGE

PLEASE SERVE:

Jerry Young,
Through his attorney of record:
Ms. Fredericka H. Wicker
LEWIS & KULLMAN
2615 Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130

Empressa Nacional Siderurgica, S.A.,
Through its counsel of record:
Miles P. Clements, Esq.
LEMLE, KELLEHER, KOHLMEYER, DENNERY,
HUNLEY, MOSS & FRILOT
2100 Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130

Cooper/T. Smith Stevedoring and
The Home Insurance Company,
Through their attorney of record:
Roch P. Poelman, Esq.
HEBERT, MOULEDOUX & BLAND
601 Poydras Street
1650 Pan American Life Center
New Orleans, LA 70130

IN THE

COURT OF APPEAL FOR THE FOURTH CIRCUIT

STATE OF LOUISIANA

NO. 90-CA-1107

JERRY YOUNG

Plaintiff-Appellee

VS.

ARMADORES de CABOTAJE, S.A.,

Defendant-Appellant

AND K & B EQUIPMENT COMPANY, INC.

APPEAL FROM THE CIVIL DISTRICT COURT
PARISH OF ORLEANS, STATE OF LOUISIANA,
NO. 84-17780
HONORABLE BERNETTE JOHNSON

ORIGINAL BRIEF OF APPELLEE,
JERRY YOUNG

FREDERICKA HOMBERG WICKER, 6977
LAWRENCE S. KULLMAN, 7884
Lewis and Kullman
2615 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
(504) 588-1500

APPEAL COUNSEL FOR
JERRY YOUNG
PLAINTIFF - APPELLEE

CIVIL CASE

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
SYLLABUS OF PRINCIPLES OF LAW	vi
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENT	7
ARGUMENT	8
A. THE SUBSTANTIVE LAW	8
B. RESPONSE TO SPECIFICATIONS OF ERRORS	12
1. THE JURY'S VERDICT ON LIABILITY, BOTH AS TO ARCASA AND ENSIDESA, WAS SUPPORTED BY THE EVIDENCE AND WAS NOT MANIFESTLY ERRONEOUS	12
2. THE JURY'S DAMAGE AWARD IS SUPPORTED BY THE EVIDENCE, AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ORDER A REMITTITUR	16

3. THE TRIAL COURT DID NOT IMPROPERLY SUBMIT CLAIMS TO THE JURY, AND IT GAVE PROPER INSTRUCTIONS.. 20

4. THE TRIAL JUDGE PROPERLY CHARGED THE JURY ON THE LAW RELATIVE TO COOPER STEVEDORING AND PROPERLY DECLINED TO SUBMIT A JURY INTERROGATORY REGARDING COOPER STEVEDORING'S "COMPARATIVE NEGLIGENCE" 21

THE COURT DID NOT ERR IN ITS RULINGS ON VARIOUS PRETRIAL AND EVIDENTIARY MATTERS 23

5. THE TRIAL COURT PROPERLY DENIED ENSIDESA'S MOTION TO CONTINUE THE TRIAL..... 24

6. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING ENSIDESA'S LIABILITY EXPERT AND CANCELING THE APRIL 1989 INDEPENDENT MEDICAL EXAMINATIONS..... 25

7. THE COURT DID NOT ERR IN PERMITTING THE TESTIMONY OF ALBERT ROSS, JOHNNY PORTER, DOUGLAS LEMOTT AND SAM DOUGLAS REGARDING THE SAFETY OF THE STOW 26

8. THE ECONOMIST'S TESTIMONY WAS PROPERLY ALLOWED..... 28

9. THE DEFENDANTS WERE NOT PREJUDICED BY BELATED KNOWLEDGE OF PLAINTIFF'S MEDICAL HISTORY AND 1987 AUTOMOBILE ACCIDENT..... 29

10. JERRY YOUNG'S CONVICTIONS WERE PROPERLY EXCLUDED 29

11. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING DR. BOGRAN'S REPORT, THE PETITION RESULTING FROM SEPTEMBER 1987 AUTOMOBILE ACCIDENT AND BY THE LIMITATION OF THE REDIRECT OF DR. CULVER 30

12. EVIDENCE OF SUBSEQUENT CHANGE IN STOW PLANS WAS PROPERLY ADMITTED 31

13. PLAINTIFF'S CLOSING ARGUMENT WAS NOT IMPROPER 31

14. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL BASED UPON ALLEGED JUROR MISCONDUCT 32

15. INDEMNITY 34

CONCLUSION 35

CERTIFICATE OF SERVICE 35

TABLE OF AUTHORITIES

PAGE

I. CASE CITATIONS

Armstrong v. State Farm Fire and Casualty Co., 423 So.2d 79 (La. App. 1st Cir. 1982) 24

Bailes v. U.S. Fidelity & Guaranty Co., 512 So.2d 633, 643 (La. App. 2nd Cir. 1987) ..... vii, 19

Belk v. Montgomery Ward and Company, Inc., 501 So.2d 1008 (La. App. 2d Cir. 1987) 27

Bennett v. Sedco Maritime, 520 So.2d 894, (La. App. 3d Cir. 1987) 34

Blandino v. Brown Erection Co., Inc., 341 So.2d 577, (La. App. 2d Cir. 1977) 34

Brown v. Southern Farm Bureau Ins. Co., 426 So.2d 684 (La. App. 1st Cir. 1982) ..... vii, 19

Burgess v. City of Baton Rouge, 477 So.2d 143 (La. App. 1st Cir. 1985) 29

Burton v. Berthelot, 567 So.2d 649 (La. App. 4th Cir. 1990) ..... vii, 16, 17, 18

Clay v. Lykes Bros. S.S. Co., Inc., 525 F.Supp. 306 (E.D. La. 1981) 14, 15

Collier v. Williams-McWilliams Co., Inc., 459 So.2d 719 (La. App. 4th Cir. 1984) ..... viii, 25

Daigle v. Coastal Marine, Inc., 488 So.2d 679 (La. 1986) ..... vii, 12

Dengle v. Hibernia National Bank, 539 So.2d 947 (La. App. 4th Cir. 1989) 26

Derr v. Kawasaki Kisen KK, 835 F.2d 490 (3rd Cir. 1987) 12

Duerden v. PBR Offshore Marine Corp., 471 So.2d 1111 (La. App. 3d Cir. 1985) 32

Edmonds v. Compagnie Generale Transatlantique, 443, U.S. 256, 99 S.Ct. 2753 (1979) ..... vii, 21

Falgoust v. Richardson Industries, Inc., 552 So.2d 1348 (La. App. 5th Cir. 1989) 26

Fernandez v. Chios Shipping Co., Ltd., 542 F.2d 145 (5th Cir. 1976) ..... vi, 9

Fields v. Senior Citizens Center, Inc., 528 So.2d 573 (La. App. 2d Cir. 1988) 32

Gordon v. Hubbard, 541 So.2d 211 (La. App. 4th Cir. 1989) 20

Handy v. Cheatum, 410 So.2d 322 (La. App. 4th Cir. 1982) 33

Harris v. Flota Mercante Grancolombiana, S.A., 730 F.2d 296 (5th Cir. 1984) ..... vi, 11, 14, 15

Heaton v. Gulf International Marine, Inc., 536 So.2d 622 (La. App. 1st Cir. 1988) 29

Hernandez v. M/V RAJAAN, 841 F.2d 582 (5th Cir. 1988) 14

Hill v. Texaco, 674 F.2d 447 (5th Cir. 1982) ..... vii, 21

Icicle Seafoods, Inc. v. Worthington, 75 U.S. 709 (1986) ..... vii, 12

Kermarec v. Compagnia General Transantlantipa, 358 U.S. 625 (1959) AMC 597 (1959) 10

Kerr-McGee v. Ma-Ju Marine Services, Inc., 830 F.2d 1332 (5th Cir. 1987) ..... vi, 8

Lemire v. New Orleans Public Service, Inc., 458 So.2d 1308 (La. 1984) 23

Lemon v. Bank Lines, Ltd., 656 F.2d 110 ..... vi, 11, 14

Lirette v. State Farm Ins. Co., 563 So.2d 850 (La. 1990)..... 13

Mitchell v. Clark Equipment Co., 561 So.2d 175 (La. App. 5th Cir. 1990)..... 17

Morrison v. J.A. Jones Const. Co., Inc., 537 So.2d 360 (La. App. 4th Cir. 1988) 23

Muzyka v. Remington Arms Co., Inc., 774 F.2d 1309 (5th Cir. 1985).....viii, 31

Nance v. Gulf Oil Corp., 817 F.2d 1176 (5th Cir. 1987)..... 23

Ogletree v. Willis-Knighton Memorial Hospital, 530 So.2d 1175 (La. App. 2nd Cir. 1988) 32

Roby v. Hyundai Merchant Marine, 700 F.Supp. 316 (EDLA 1983) 14, 15

Roper ex rel Roper v. Gelsomino, 507 So.2d 868 (La. App. 5th Cir. 1987)..... 27

Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884 (5th Cir. 1978)..... vii, 23

Sather v. White, 388 So.2d 402 (La. App. 1st Cir. 1980)..... 29

Schwamb v. Delta Air Lines, 516 So.2d 452 (La. App. 1st Cir. 1987)..... vii, 19

Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 101 S.Ct. 1614 (1981).....vi, 9, 10, 11

Trapani v. State Farm Mutual Automobile Insurance Company, 524 So.2d 226 (La. App. 5th Cir. 1988)..vii, 27

Treadaway v. Societe Anonyme Louis-Dreyfus, 894 F.2d 161 (5th Cir. 1990) 14

Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981) ..... vi, 9, 11, 14, 15

Uhler v. Evangeline Riding Club, 525 So.2d 550 (La. App. 3d Cir. 1988) 29

Webb v. Insurance Company of North America, 396 So.2d 508 (La. App. 3d Cir. 1981) 29

Williams v. Sentry Insurance Co., 370 So.2d 901 (La. App. 1st Cir. 1979) 32

Woods v. Samissa, 873 F.2d 842 ..... vi, vii, 10, 11, 14, 15, 20, 21

II. STATUTORY AUTHORITIES

FEDERAL

33 U.S.C.A. § 902(21) ..... vi, 8

33 U.S.C.A. § 905(b) ..... vi, 8

LOUISIANA

LSA – R.S. 40:893 29

LSA – C.C. art. 2324 23

LSA – C.C.P. art. 1601 24

LSA – C.C.P. art. 1602 ..... vii, 24

LSA – C.C.P. art. 1793 C ..... vii, 20

LSA – C. Evid. art. 403 31

LSA – C. Evid. art. 407 ..... viii, 31

LSA – C. Evid. art. 606 B ..... viii, 33

LSA – C. Evid. art. 609 A 30

LSA – C. Evid. art. 701 27

LSA – C. Evid. art. 702 27

LSA – C. Evid. art. 704 27

SYLLABUS OF PRINCIPLES OF LAW

1. "In the event of injury to a person covered under this act caused by the negligence of a vessel, then such a person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of § 33 of this Act." 33 U.S.C.A. § 905(b).

2. For purposes of liability pursuant to 33 U.S.C. § 905(b), the "vessel" encompasses both the owner, operator and the time charterer. 33 U.S.C. § 902(21); *Kerr-McGee v. Ma-Ju Marine Services, Inc.*, 830 F.2d 1332, 1338 (5th Cir. 1987).

3. The plaintiff may recover from either the owner/operator or the time charterer for negligence. These entities may attempt to shift the burden between them by way of indemnification. *Fernandez v. Chios Shipping Company, Ltd.*, 542 F.2d 145 (2d Cir. 1976); *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981).

4. The vessel "owes to the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances.' " *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 166, 1015, Ct. 1614, 1622 (1981).

5. "With regard to a condition that exists prior to or at the outset of cargo operations, the vessel must exercise ordinary care to have the ship and its equipment

in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety. . . . " *Id.*, 451 U.S. at 167; 101 S.Ct. at 1622.

6. The vessel has a duty to warn the stevedore of any hazardous conditions on the ship or with respect to its equipment that are known or should be known to the vessel in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations, and that are not known by the stevedore and would not be obvious to, or anticipated by, him if reasonably competent in the performance of his work. *Id.*, 451 U.S. at 167, 101 S.Ct. at 1622.

7. A vessel interest has an obligation to exercise due care to ensure that the vessel's cargo is loaded such that it can be discharged with reasonable safety. The defendants may be found liable "for damages arising from a dangerous stow [in] situations where the [defendants] knew or should have known of the dangerous condition." *Woods v. Samissa*, 873 F.2d 842, 850 (5th Cir. 1989); *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981); *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984).

8. That a danger is "obvious" is not necessarily a complete defense to a longshoreman's suit, "because when faced with an openly dangerous shipboard condition, the longshoreman's 'only alternatives would be to leave his job or face trouble for delaying the work.' " . . . Thus " 'a longshoreman's own knowledge of a shipboard hazard will not negate a shipowner's duty of care which would otherwise exist.' " *Harris v. Flota Mercante Grancolombiania, S.A.*, 730 F.2d at 299-300.

9. In a maritime case tried in state court, the standard of appellate review is governed by Louisiana law.

Icicle Seafoods, Inc. v. Worthington, 75 U.S. 709 (1986); *Daigle v. Coastal Marine, Inc.*, 488 So.2d 679 (La. 1986).

10. "A trier of fact has much discretion in the assessment of general damages. Before an appellate court can disturb a trial court's award of general damages, the record must clearly reveal that the trier of fact abused its discretion in making the award. If such an abuse of discretion is found, then the court may look to other awards made in similar cases as an aid to raising or lowering the award to the highest or lowest point which would have been reasonably within the discretion of the jury." *Burton v. Berthelot*, 567 So.2d 649 (La. App. 4th Cir. 1990).

11. "Future medical expenses must be established with some degree of certainty. However, an award of future medical expenses is in great measure highly speculative and not susceptible of calculation with mathematical certainty." *Burton v. Berthelot*, 567 So.2d 649, 663 (La. App. 4th Cir. 1990).

12. With regard to whether a jury's award is excessive, the Court of Appeal should consider "whether the award can be supported under the interpretation of the evidence most favorable to the plaintiff which reasonably could have been made by the fact finder." *Bailes v. U.S. Fidelity & Guaranty Co.*, 512 So.2d 633, 643 (La. App. 2nd Cir. 1987).

13. The jury is not "bound" by the testimony of an economist. The test is whether or not the award is supported by the evidence. *Brown v. Southern Farm Bureau Ins. Co.*, 426 So.2d 684 (La. App. 1st Cir. 1982).

14. The jury is not required as a matter of law to use any specific discount factor and can lawfully use the total offset method in calculating the plaintiff's loss

of future earnings. *Schwamb v. Delta Airlines*, 516 So.2d 452, 465 (La. App. 1st Cir. 1987).

15. "A party may not assign as error the giving or the failure to give an instruction unless he objects thereto either before the jury retires to consider its verdict or immediately after the jury retires, stating specifically the matter to which he objects and the grounds of his objection." LSA – C.C.P. art. 1793 C.

16. A shipowner sued by an injured stevedore cannot obtain contribution from a concurrently negligent employer. *Edmonds v. Compagnie Generele Transatlantique*, 443 U.S. 256, 268; 99 S.Ct. 2753, 2760 (1979); *Woods v. Samissa*, 873 F.2d 842, 846 (5th Cir. 1989); *Hill v. Texaco*, 674 F.2d 447, 449 (5th Cir. 1982).

17. Since "the employer/stevedore's negligence would not, if proved, affect the longshoreman's recovery," there is no reason to submit the issue of the stevedore's negligence to the jury. *Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884, 885 (La. 1978).

18. "A continuance shall be granted if at the time a case is to be tried, the party applying for a continuance shows that he has been unable, with the exercise of due diligence, to obtain evidence material to his case . . . "LSA – C.C.P. art. 1602. The "party moving for a continuance has the burden of proving that his motion falls within these peremptory grounds." *Collier v. Williams-McWilliams Co., Inc.*, 459 So.2d 719, 722 (La. App. 4th Cir. 1984).

19. Qualification of experts is within the discretion of the trial judge and will not be reversed absent manifest error. *Trapani v. State Farm Mutual Automobile Insurance Company*, 524 So.2d 226, 230 (La. App. 5th Cir. 1988).

20. Evidence of subsequent remedial measures is admissible when offered for a purpose other then proving negligence or culpable conduct, "such as proving ownership, authority, knowledge, control, or feasibility of precautionary measures, or for *attacking credibility*." LSA – C. Evid. art. 407 (Emphasis added.); *Muzyka v. Remington Arms Co., Inc.*, 774 F.2d 1309, 1313 (5th Cir. 1985).

21. The "Golden Rule" addresses only argument wherein counsel asks the jury to put itself in the plaintiff's shoes *with regard to damages. Duerden v. PBR Offshore Marine Corp.*, 471 So.2d 1111, 1114 (La. App. 3d Cir. 1985).

22. "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question of whether any outside influence was improperly brought to bear upon any juror . . . Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes." LSA – C. Evid. art. 606 B.

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

Petitioner/appellee, Jerry Young, a longshoreman, brought suit in the Civil District Court for the Parish of Orleans for injuries he sustained while off-loading steel beams from a vessel, the M/V LORENA, in New Orleans,

Louisiana. The defendants were Empresa Nacional Siderurgica, S.A. (Ensidesa), a Spanish steel manufacturer that had loaded the cargo and chartered the vessel for the voyage to New Orleans, and Armadores de Cabotaje, S.A. (ARCASA), the owner and operator of the vessel.

The plaintiff claimed that ARCASA and Ensidesa were both liable for negligence under section 905(b) of the Longshore and Harbor Workers' Compensation Act [33 U.S.C. section 905(b)]and, additionally, that Ensidesa, as the stevedoring company that had loaded the vessel, was liable for negligence under the general maritime law.

The jury found that both defendants were negligent and awarded $1,700,000 in damages.

Both defendants filed motions for a new trial and/or for judgment notwithstanding the verdict. The trial court denied the motions and this appeal followed.

STATEMENT OF THE FACTS

On November 22, 1982, Jerry Young, then a 46-year-old experienced longshoreman employed by Cooper Stevedoring, was working with his regular gang in the No. 2 hold of the M/V LORENA, off-loading steel beams, when the sling his coworkers were using to try to pry up the beams slipped off, swung wildly, and hit him in the head before he could get out of the way. (Record, Vol. V, pp. 194-195; Vol. IV, pp. 54-60, 262, 289.)

This incident was caused by the hazardous condition resulting from the way the loading stevedore, Ensidesa, had stowed the steel. (Record, Vol. IV, pp. 46-60; Vol. IV, pp. 287, 325, 334-335; Vol. V, p. 448.)

These were 60-foot steel beams, called "H" or "I" beams. This means that they were webbed and flanged. If one looked at the end of a beam, one would see an "H" or an "I" shape depending on how the beam was turned. (Record, Vol. IV, pp. 264-265, 278-280; Vol. V, 318-321.)

The beams could be stowed on either the edges (the "H" manner) or on the flanges (the "I" manner). (Record, Vol. IV, pp. 39, 264; Vol. V, pp. 362-367, 421.) Wooden dunnage is placed between each tier of steel. (Record, Vol. IV, pp. 39-40, 265-267; Vol. V, p. 427.) When the beams are stowed in the "H" manner, the edges of the beams cut into the dunnage. The extent of damage to the dunnage depends on the weight of the stow (that is, how high it is loaded) and the quality of the wood used. Stowage in the "H" manner also creates an uneven surface on which the men have to walk while off-loading the cargo. (Record, Vol. IV, pp. 39-40, 265, 268-269, 280; Vol. V, pp. 366, 421-424, 442.)

On the other hand, stowage in the "I" manner puts a flat surface against the dunnage, so it is not cut. Stowage in this manner also gives the longshoremen a flat surface upon which to walk and work. (Record, Vol. IV, pp. 39-40, 54-60, 320, 342; Vol. V, pp. 367, 427.)

Defendant Ensidesa chartered this vessel and loaded it in Aviles, Spain. Ensidesa, as charterer and as loading stevedore, chose to stow the steel in the "H" manner. Also, the steel was loaded all the way to the top of the holds. (Record, Vol. IV, pp. 43, 355, 406; Vol. V, pp. 351, 354-355, 406, 410-414.)

Ensidesa's chief of port operations prepared the stowage plan and supervised the Ensidesa longshoremen

who loaded the vessel. (Vol. V, pp. 351, 354-355, 406.) He was responsible for seeing that the vessel was loaded properly to permit safe off-loading. (Vol. V, pp. 411, 414.)

The master of the M/V LORENA, ARCASA's employee, approved the stowage plan prior to loading the vessel. (Vol. V, pp. 352, 410.) As master of the vessel, he was the person ultimately responsible for the manner in which the cargo was stowed. (Vol. V, pp. 352, 410.)

Ensidesa knew that use of the "H" method to stow the steel beams would tend to cut and crush the dunnage between the tiers of steel beams. (Record, Vol. V, pp. 366-367, 424, 427.)

Ensidesa further knew that when the dunnage was crushed it made safe off-loading with standard rigging very difficult, if not impossible. (Record, Vol. V, p. 367.) In fact, when Ensidesa's own longshoremen encountered crushed dunnage, they used a different method and different tools to off-load the steel beams, unknown to American stevedores. (Vol. IV, pp. 61, 87, 100, 110, 335, 341; Vol. V, pp. 367-369, 385-386 416-421.)

In such circumstances, Ensidesa used a giant clamp to lift the beams sufficiently to replace the crushed dunnage, thereby permitting the placement of the chains for off-loading. (Vol. V, pp. 368-369, 416, 421.) Ensidesa's director of the Port of Aviles had been to the United States and observed American stevedoring operations. He knew that the giant clamps being used by Ensidesa were unknown to American longshoremen. (Vol. V, pp. 369-370, 385-386, 417-421.)

Despite this, Ensidesa never gave any warning whatsoever to Cooper Stevedoring about the need for special equipment and techniques. (Vol. V, pp. 416-421.)

After the M/V LORENA arrived at the Port of New Orleans, Cooper Stevedoring began the off-loading process. Mr. Glen Reibe, Cooper's ship superintendent, testified that when the M/V Lorena arrived he noted that the cargo was stowed in the "H" manner, which was very unusual. (Record, Vol. IV, p. 342-343.)

The longshoremen used standard rigging to remove the steel beam cargo. The crane cable was attached to a T-bar from which four cables were suspended, two on each side, with hooks at the end. (Vol. IV, pp. 36-37.)

Normally the longshoremen would insert wires between the tiers of beams. With adequate dunnage, the wires could be inserted a good distance from the ends of the beams. (Vol. IV, pp. 45, 271.) Then the wires would be attached to the hooks and the crane would lift the load. The longshoremen would insert chains beneath the bundles, then the chains would be attached to the hooks, and the load would be lifted out of the hold. (Vol. IV, p. 37, 271.)

When the steel beams are loaded in the "I" method, the dunnage present between the tiers of steel beams permits the safe insertion of the wires a sufficient distance from the end of the beams for safe and efficient lifting and placement of chains. (Vol. IV, p. 40, 271.)

But when the beams are loaded in the "H" manner and the dunnage is crushed, the situation is entirely different. In this case, as the longshoremen removed

cargo from the hold of the LORENA and reached lower tiers of beams, the dunnage became more and more crushed until the steel beams virtually were on top of each other without any separation at all. (Vol. IV, pp. 46, 50, 54, 267, 269, 345-346, 396-400.)

The Cooper marine surveyor, Capt. Ross, observed the entire off-loading process. He testified that the dunnage (which was supplied by Ensidesa) was soft and of poor quality that broke with compression. He saw that the longshoremen were having a lot of difficulty off-loading the beams and that they had to "nip" the ends of the beams to get them out. **Capt. Ross testified that he had never seen a stow of steel beams as bad as the one he observed on the M/V Lorena in November, 1982.** (Record, Vol. V, pp. 47, 442-448, 516-519.)

Mr. Glen Reibe testified in the same vein:

Q. As the longshoremen got further and further down in the hold and had discharged tiers of steel beams, what did you observe with regard to the dunnage?

A. I noticed that the dunnage had been crushed severely due to the compression of the steel on top of it.

Q. What did that do with regard to the off-loading longshoremen?

A. Made it even more harder as we got deeper. It was almost as if you had steel on top of steel without any dunnage.

(Vol. IV, pp. 345-46.)

Mr. Douglas Lemott, a member of Jerry Young's gang and an eyewitness to his injury, described the situation as follows:

> Q. On the day of Mr. Young's injury, can you tell the jury what it was like trying to unload those steel beams that were in that vessel, the M/V Lorena that day?
>
> A. Well, the dunnage under it had broke and the beams were beams on beams where they had fell and joined together and when we tried to get the chain under it you couldn't get a chain under it so we would catch just as much as we could catch to try and raise it up and then try to put a piece of wood under it until we could get enough to raise them all the way up.

(Vol. IV, pp. 45-46.)

In effect, the longshoremen were putting in dunnage after the cargo had been stowed. (Vol. IV, pp. 46-50, 269-272, 275-278, 375.)

It became impossible to insert the wires far enough onto the beams to lift them and place the chains. The longshoremen had to "nip" the end of the beam, or place the wire as far in as they could force it, have the beam lifted a little while they then threw wood chunks under the beam and then force the wire back farther. Of course, "nipping" the edge of the beam created a serious danger. (Vol. IV, pp. 46-50, 54-56, 127, 287-288, 302, 325, 329, 344, 400-401; Vol. V, pp. 447-448.)

But the longshoremen had no alternative but to continue to off-load the vessel as carefully as they could.

(Vol. IV, pp. 61, 100, 275, 302, 335-336, 345-346, 352, 363-364, 391, 402.)

In due course, while the longshoremen were "nipping" onto some beams and trying to raise them in order to insert dunnage, the wire slipped off the end and the T-bar swung wildly through the hold. One of the longshoremen screamed to get out of the way, but Jerry Young was not able to move in time to avoid this swinging bar. He was hit in the head and knocked unconscious onto the steel beams. (Vol. IV, pp. 54-61, 272-278, 288-290, 332-333; Vol. V, 203-206.)

As a result of this incident, Jerry Young suffered injuries to his head and lower back and arm.[1]

He was briefly hospitalized and then conservatively treated by Dr. Bogran for his continuing complaints.

In April, 1983, Dr. Bogran consulted Dr. John Watermeier, an orthopedic surgeon, because Mr. Young was continuing to complain of pain in his low back and radiating pain into his leg.

Dr. Watermeier readmitted Mr. Young to the hospital and diagnosed a probable ruptured disc at L4-L5 and attempted a chemical laminectomy with a chymopapain injection. Mr. Young's complaints improved somewhat and he was discharged from the hospital on April 19, 1983.

---

[1] Jerry Young had worked as a longshoreman for most of his adult life. He had suffered some minor injuries, but nothing that had caused him to miss work for a substantial period of time. At the time of this incident he was in good health, doing his full duties, and was not under any doctor's care.

Unfortunately, the improvement was only temporary and in June of 1983 Dr. Watermeier found that Mr. Young was again complaining of severe pain and was walking with a pronounced limp. At this point Dr. Watermeier recommended a lumbar laminectomy. Mr. Young was again hospitalized, from June 23 to June 28, 1983, and the procedure was performed. (Record, Vol. IV. p. 201.)

After the operation, Mr. Young continued to be followed by Dr. Watermeier. He had complaints with respect to both his back and leg and also his wrist. Dr. Watermeier diagnosed a probable carpal tunnel syndrome resulting from the injury in November, 1982. (Record, Vol. IV, p. 206.)

Mr. Young continued to see Dr. Watermeier every one or two months. By January, 1984, Dr. Watermeier noted that he appeared to be chronically depressed. In February, 1984, Dr. Watermeier began giving Mr. Young anesthetic injections into the muscles around his spine in order to try to at least temporarily relieve his symptoms. In addition, Mr. Young was taking oral Percodan, a narcotic pain medication.

Despite the two surgeries that had been performed, Mr. Young's symptoms did not improve. He continued to have severe pain in his back and leg, requiring monthly anesthetic injections. In December, 1984, Dr. Watermeier again hospitalized him for more diagnostic tests in light of the continuing problems.

Then, in May, 1984, Dr. Watermeier hospitalized Mr. Young for the fifth time and performed a laminectomy and fusion operation.

Unfortunately, Mr. Young's symptoms did not significantly improve. He continued to see Dr. Watermeier and to receive anesthetic injections at the office. Because the treatments provided only partial relief, Dr. Watermeier hospitalized Mr. Young for the sixth time, in September, 1985, so that he could be given a morphine injection into the spine.

Dr. Watermeier continued to follow Mr. Young and continued to try to treat his pain with various modalities, including Percodan, Marcaine anesthetic injections, and periodic hospitalizations to have morphine injections into his spine.

These treatments continued up to the time of trial.

Dr. Watermeier testified that Mr. Young was totally and permanently disabled. Even if he could be trained for some type of sedentary light employment, the constant pain and need for ongoing orthopedic and psychiatric treatment makes employment a practical impossibility. (Vol. IV, pp. 216, 219, 225, 226, 229-230, 234.)

Dr. Robert Newman, a psychiatrist, began seeing Mr. Young in April, 1988. He diagnosed his condition as an adjustment disorder, depression and withdrawal, and he began regular psychiatric therapy. (Vol. V, pp. 108, 134.) In January, 1989, Mr. Young became suicidal. (Vol. V, p. 122.) At the time of trial Mr. Young was still under Dr. Newman's care and it was Dr. Newman's opinion that he was disabled from returning to work as a result of his psychiatric problems resulting from his injury and inability to work. (Record, Vol. V, pp. 136-138, 191.)

At the time of his injury, Mr. Young was earning about $25,000 a year. (Vol. V, pp. 196-197.) From November 22, 1982, until the time of trial, Mr. Young was never again able to return to employment. In the opinion of his treating physicians, it was unlikely that Mr. Young would ever work again.

SUMMARY OF ARGUMENT

Both ARCASA and Ensidesa were negligent in failing to ensure that the loading stevedore in Aviles, Spain, (ENSIDESA) stowed the cargo in such a manner that it could be discharged in New Orleans with reasonable safety. The defendants further failed to warn the off-loading longshoremen both of the danger presented by the crushed dunnage and resulting overlapping, jammed and enmeshed stow and of the need for special equipment, or C-Clamps known to the Spaniards but unknown to American stevedores, to safely off-load the vessel.

The jury did not commit manifest error in finding that the two defendants breached their duty of care to Jerry Young. The jury properly evaluated the credibility of the witnesses, resolved conflicts in the testimony and made reasonable inferences of fact.

With regard to the damages awarded, the jury did not abuse its much discretion. The general damage award is supported by evidence that Jerry Young has been permanently and totally disabled and has endured an extraordinary course of medical treatment and measures to relieve pain that is going to continue for the remainder of his life.

The jury's awards for loss of earnings and future medical expenses are supported by the evidence

The defendants moved for a new trial and/or judgment not withstanding the verdict upon substantially the same grounds as are urged on this appeal. The trial court, which was intimately familiar with these lengthy proceedings, denied these motions. Your Honors should find that the trial court did not abuse her discretion and that the jury's verdict is not clearly wrong.

ARGUMENT

A. THE SUBSTANTIVE LAW.

Jerry Young sued ARCASA and Ensidesa as "the vessel" for damages under the Longshore and Harbor Workers' Compensation Act, (LHWCA), 33 U.S.C. section 905 (b). He also sued Ensidesa as the loading stevedore for negligence pursuant to general maritime law.

For purposes of liability pursuant to 33 United States Code section 905(b), the "vessel" encompasses both ARCASA as owner/operator and Ensidesa as the time charterer. 33 U.S.C. section 902(21); *Kerr-McGee v. Ma-Ju Marine Services, Inc.*, 830 F.2d 1332, 1338 (5th Cir. 1987). Jerry Young has the right to recover from both for negligence. These entities may attempt to shift the burden between them by way of indemnification. *Fernandez v. Chios Shipping Co., Ltd.*, 542 F.2d 145 (5th Cir. 1976); *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981).

In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, (1981), the United States Supreme

Court clarified the scope of the duties owed by the vessel to stevedores and longshoremen.

Stating that the vessel "owes to the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances,' " the Supreme Court in *Scindia* identified three separate aspects of this duty. *Id.*, 451 U.S. at 166, 101 S.Ct. at 1622.

First, with regard to a condition that exists prior to or at the outset of cargo operations, the vessel must exercise

> ordinary care to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety . . .

Id., 451 U.S. at 167, 101 S.Ct. at 1622.

A corollary of this first *Scindia* duty is that the vessel has a duty to warn the stevedore of any hazardous conditions on the ship or with respect to its equipment that are known or should be known to the vessel in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations, and that are not known by the stevedore and would not be obvious to, or anticipated by, him if reasonably competent in the performance of his work. *Id.*, 451 U.S. at 167, 101 S.Ct. at 1622.

The "*Scindia* No. 2 duty" involves the vessel's liability when it actively involves itself in cargo operations and either negligently injures a longshoreman or fails to maintain equipment, etc., in the area over which it has maintained actual control during the stevedoring operation. No party alleged that, at the time Jerry Young was

injured, the vessel was in active control of the area in question.

The third *Scindia* duty applies to dangerous conditions that develop or come to light once stevedoring operations are under way. *Scindia*, 451 U.S. at 175-176, 101 S.Ct. at 1626-27. A vessel will, in this situation, be liable under section 905(b) if:

> It had actual knowledge of a dangerous condition . . . and actual knowledge that the stevedore was not acting to correct it.

Woods v. Sammisa, 873 F.2d 842, 847 (5th Cir. 1989).

In this case, Jerry Young contended that the vessel breached the first *Scindia* duty in two ways. First, he contended that the two defendants were negligent in failing to ensure that the loading stevedore in Aviles, Spain, (Ensidesa) stowed the cargo in such a manner that it could be discharged in New Orleans with reasonable safety. Secondly, and also under the first *Scindia* duty, he contended that the defendants failed to warn him both of the danger presented by the crushed dunnage and resulting overlapping, jammed and enmeshed stow and of the need for special equipment, or C-clamps known to the Spaniards but unknown to the American stevedores, to safely off-load the vessel. *Kermarec v. Compagnie Generale Transatlantique*, 358 US 625, 1959 AMC 597 (1959).

He further contended that Ensidesa, as the loading stevedore, was negligent in creating an unreasonably dangerous stow on the vessel. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 1959 AMC 597 (1959).

The defendants, on the other hand, took the position that the cause of Jerry Young's accident was an unsafe condition created by the Cooper stevedores during the off-loading operation,[2] rendering this a case to be judged by the standards of the third *Scindia* duty.[3]

Since *Scindia*, several courts have considered the question whether the vessel's duty of reasonable care extends to hazardous cargo conditions created by a loading stevedore. The clear majority have decided that it does.

This question was first raised in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981). There an off-loading stevedore was injured when he fell from a stack of cargo that had not been properly shored by the loading stevedore. In concluding that the vessel owner and charterer could be found liable on these facts, the Ninth Circuit reasoned as follows:

> Imposing a duty on the Owner or Time-Charterer or both in this case should refer to the congressional goal of safety. The foreign stevedore, who is presumably primarily at fault, may in many cases be beyond reach of the court's processes, and the injured longshoreman would be unable to sue it. As between the vessel and

---

[2] *See* Arcasa Brief, p. 13, paras. 1, 2; n.4; Ensidesa Brief, pp. 9-13.

[3] The trial court correctly found that whether the dangerous condition, if any, that caused Jerry Young's casualty existed at the beginning of off-loading or developed within the confines of cargo operations was an issue of fact for the jury, and submitted the law relevant to both plaintiff's and defendant's theories to the jury. (Vol. VII, p. 106, 11. 13-22.)

> the stevedore-employer, the vessel is the only one in a position to insure the safety of the longshoremen. The off-loading stevedore has no control whatsoever over the foreign stevedore. The vessel, on the other hand, can insure safety by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the off-loading stevedore of concealed dangerous conditions created by the foreign stevedore. . . . We hold, therefore, that the vessel had a duty to protect the plaintiff against concealed dangers created by a foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of.

Id. at 1304.

In light of this duty, the Court held that the plaintiff could recover if he proved by a preponderance of the evidence that the vessel "knew or should have known" of a hazardous condition created by the loading stevedore. *Id.* at 1304.

In three subsequent decisions the Fifth Circuit Court of Appeals has agreed that the vessel may be found liable under 905(b) if it knew or should have known of dangerous conditions created by a loading stevedore and failed to either correct the condition or warn about it. *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981); *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984); *Woods v. Sammissa*, 873 F.2d 842.

In *Woods v. Sammissa*, 873 F.2d at 850, the Fifth Circuit summarized these legal principles as follows:

> **Under the first *Scindia* duty, a vessel interest has an obligation to exercise due care to ensure that the vessel's cargo is loaded such that it can**

> **be discharged with reasonable safety. The defendants may be found liable "for damages arising from a dangerous stow [in] situations where the [defendants] knew or should have known of the dangerous condition."**

In this case, Judge Johnson charged the jury in accordance with these principles of law, and there was no objection by either defendant to the Court's instructions.[4]

B. RESPONSE TO SPECIFICATIONS OF ERRORS.

In this appeal, ARCASA has specified 7 errors and 11 issues for review, and Ensidesa has specified 17 errors and 20 issues for review. In effect, each defendant has attacked virtually every discretionary decision made by Judge Johnson during a lengthy trial.

We will discuss each of the alleged errors that was briefed, but will give greatest attention to what would appear to be the defendants' most important contention, that the verdict, both on liability and damages, was manifestly erroneous.[5]

---

[4] In *Derr v. Kawasaki Kisen KK*, 835 F.2d 490, 495-96 (3rd Cir. 1987), the Third Circuit held that the shipowner could not be held liable for conditions arising from the stowage of cargo. Obviously, even if this minority view were accepted, it would have no effect here on Ensidesa's liability under the general maritime law for its negligence as the loading stevedore.

[5] We have tried to simply address the merits of the defendants' arguments. This is obviously an important case to all concerned. That does not excuse some of the statements that have been made; for example, "The trial court facilitated plaintiff's concealment and ambush." (Ensidesa Brief, p. 50.)

1. THE JURY'S VERDICT ON LIABILITY, BOTH AS TO ARCASA AND ENSIDESA, WAS SUPPORTED BY THE EVIDENCE AND WAS NOT MANIFESTLY ERRONEOUS.

Both ARCASA and Ensidesa contend that the jury's verdict was not supported by the evidence and should be set aside. In this regard, the standard of appellate review is governed by Louisiana law. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986); *Daigle v. Coastal Marine, Inc.*, 488 So.2d 679 (La. 1986). Under Louisiana law:

> It is well settled that a court of appeal may not set aside a finding of fact by a trial court or a jury in the absence of "manifest error" or unless it is "clearly wrong," and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. . . .
>
> When findings are based on determinations regarding the credibility of witnesses, the manifest error – clearly wrong standard demands great deference to the trier of fact's findings; for only the fact finder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said.

Lirette v. State Farm Ins. Co., 563 So.2d 850, 852 (La. 1990).

From the evidence presented the jury could reasonably conclude the following: (1) Ensidesa, acting as loading stevedore, developed and carried out the stowage plan for the M/V LORENA in October, 1982. (Vol. IV, pp. 335, 406; Vol. V, pp. 351, 354-355, 406, 410-414.) (2)

Ensidesa was responsible for the "H" method of stow, the height of the stow, and the nature, amount and placement of the wood dunnage. *Id.* (3) the master of the vessel, an Arcasa employee, approved the stowage plan prior to loading and accepted the vessel when the stow was complete. (Vol. IV, pp. 355, 406; Vol. V, pp. 351, 354-355, 406, 410-414.) (4) the master was the person ultimately responsible for the manner of the stow. (Vol. V, pp. 352, 364, 410.) (5) Ensidesa knew when it loaded the vessel that the "H" method of stow tended to crush the dunnage between the tiers of steel beams making safe off-loading with standard rigging very difficult, if not impossible. (Vol. V, pp. 366-367, 424, 427.) (6) Ensidesa knew that its own longshoremen used a special technique and equipment, giant C-Clamps, to off-load "H" stows with crushed dunnage. (Vol. V, pp. 368-369, 416, 421.) (7) Ensidesa knew or should have known that this technique and necessary equipment was unknown to American stevedores. (Vol. V, pp. 369-370, 385-386, 417-421.) (8) Neither Ensidesa nor ARCASA at any time warned the American stevedore, Cooper T. Smith, either of the probable crushed dunnage and consequent jammed, overlapping and enmeshed nature of the stow in the lower tiers or of the need for special equipment to safely off-load the vessel. (Vol. V, pp. 416-421.) (9) Although Ensidesa chose, and ARCASA approved, the "H" stow, it was no more difficult or time consuming to load a vessel in the "I" method. (Vol. V, pp. 376, 421.) (10) Once the cargo was stowed, there was nothing the off-loading stevedores could do to correct the situation except to try to get the steel out as carefully as possible.

As discussed above, Judge Johnson charged the jury in accordance with the majority view that "the defendants may be found liable 'for damages arising from a dangerous stow [in] situations where the [defendants] knew or should have known of the dangerous condition.' " *Woods v. Sammisa*, 873 F.2d at 850. There is no requirement that the vessel have actual knowledge of the danger presented before liability attaches. Rather, that duty speaks in terms of a failure to exercise care. *Woods v. Sammissa*, 873 F.2d at 851.[6]. Here, as in *Woods*, neither defendant denies actual knowledge of the nature of the stow; rather they contend that the evidence does not establish either that the "H" stow, with its consequent crushed dunnage and jammed beams, created an unreasonable risk of harm to the longshoreman or that they could be charged with knowledge of the risk if it existed.

The evidence that the "H" stow was unusual and unnecessary and that it foreseeably increased the risk of injury to the longshoremen and that the risk could have been avoided by using the "I" stow or by warning the American stevedore of the need for special off-loading equipment, that is, giant C-clamps, was ample for the jury to conclude that the defendants did not exercise

---

[6] Defendant Ensidesa argues that the *Woods* statement of the first *Scindia* duty at pages 850-851 is an "oversimplification." However, the Fifth Circuit in *Woods* was reiterating earlier statements made by various courts – *Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir. 1988); *Harris v. Flota Mercante Grancolumbiana*, 730 F.2d 296; *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110; *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300; *Roby v. Hyundai Merchant Marine*, 700 F.Supp. 316 (E.D. La. 1988); *Clay v. Lykes Bros. S.S. Co., Inc.*, 525 F.Supp. 306 (E.D. La. 1981). In *Treadaway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161 (5th Cir. 1990) the Fifth Circuit confirmed this view of the law.

reasonable care to provide the longshoremen with a safe place to work. *Woods v. Sammisa*, 873 F.2d at 850-851.

Evidence that the stow was "dangerous," "poor," and "bad" is sufficient to support a jury finding of negligence. *See Woods v. Sammisa*, 873 F.2d at 851, and *Harris v. Grancolumbiana*, 730 F.2d at 298.

As the loading stevedore, Ensidesa is also liable to plaintiff for its negligence in creating a dangerous stow that it was reasonable to foresee might injure an off-loading longshoreman. *Turner v. Japan Lines, Inc.*, 651 F.2d 1300; *Roby v. Hyundai Merchant Marine*, 700 F.Supp. 316; *Clay v. Lykes Bros. S.S. Co., Inc.*, 525 F.Supp. 306.

Finally, the defendants contend that they may not be held liable for a hazard that was "open and obvious" to the off-loading longshoremen. But this is simply not the law.

In *Harris v. Flota Mercante Grancolumbiana, S.A.*, the district court relieved the defendant from liability, finding that the danger had been "obvious" to all the longshoremen, including the plaintiff. The Fifth Circuit Court of Appeals reversed, holding as follows:

> But that the danger was "obvious" is not necessarily a complete defense to a longshoreman's suit, "because when faced with an openly dangerous shipboard condition, the longshoreman's 'only alternatives would be to leave his job or face trouble for delaying the work.' " . . . Thus " 'a longshoreman's own knowledge of a shipboard hazard will not negate a shipowner's duty of care which would otherwise exist.' "

730 F.2d at 299-300.

Here, the uncontradicted evidence is that the longshoreman had no reasonable alternative other than to try to remove this steel cargo as carefully as possible. The fact that they were aware of the danger is simply not a defense to the claims against the defendants who created the hazard in the first place. Judge Johnson charged the jury in accordance with then settled legal principles, and the defendants made no objection. Clearly the jury had ample evidence to find that the defendant was not relieved of liability because the off-loading longshoremen had no alternative but to proceed to off-load the cargo.

2. THE JURY'S DAMAGE AWARD IS SUPPORTED BY THE EVIDENCE, AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ORDER A REMITTITUR.

Defendant ARCASA (but not Ensidesa) attacks as excessive the jury's awards for general damages, past and future loss of earnings and earning capacity, and future medical expenses.

In considering this contention, the Court of Appeal must be guided by the following principles of Louisiana law:

> A trier of fact has much discretion in the assessment of general damages. Before an appellate court can disturb a trial court's award of general damages, the record must clearly reveal that the trier of fact abused its discretion in making the award. If such abuse of discretion is found, then the court may look to other awards made in similar cases as an aid to raising or lowering the

> award to the highest or lowest point which would have been reasonably within the discretion of the jury.

Burton v. Berthelot, 567 So.2d 649, 661 (La. App. 4th Cir. 1990). (Citations omitted.)

Here, the jury awarded Jerry Young $775,000 for past and future physical and mental pain and suffering and for his permanent disability. We respectfully suggest that this award is supported by evidence of an extraordinary course of medical treatment and measures taken to relieve pain and the uncontradicted testimony that Mr. Young is going to suffer with the same level of physical pain and emotional difficulties for the remainder of his life.

As of the time of trial Mr. Young had been hospitalized on eight occasions; he had had three surgical procedures; he had received anesthetic injections into the muscles around his spine on approximately 40 occasions; he had been hospitalized to have morphine injected into his spine on at least three occasions; he was regularly taking an oral narcotic pain medication; and he was permanently and totally disabled. (Watermeier, Record, Vol. IV, pp. 182-237.)

The medical testimony established that Mr. Young would probably suffer to the same extent for the remainder of his life and would continue to have to have significant ongoing treatment for the relief of his symptoms, including hospitalization and probable additional surgery.

In addition, as discussed above, Mr. Young suffered substantial psychological injury as a result of his injuries

and resulting inability to work. As Dr. Robert Newman, his treating psychiatrist testified, Mr. Young's whole sense of self was tied up in his ability to do his job and do it well. The combination of the physical disability and pain coupled with the vocational disability caused Mr. Young to suffer severe depression and anxiety. According to Dr. Newman he had difficulty in sleeping, loss of appetite and decreased interest in sex. (Record, Vol. V, p. 112.)

Dr. Newman saw Mr. Young regularly and prescribed antidepressant medication.

In January, 1989, Mr. Young's depression got worse and he told Dr. Newman that he had no hope and saw no future for himself and was seriously thinking about suicide. Although Mr. Young was no longer suicidal at the time of trial, his emotional problems remained.

As Dr. Newman testified, "his image of himself had been damaged beyond repair" by his injury and resulting disability. (Record, Vol. V, p. 136.)

Given the foregoing, we respectfully suggest that the jury's award of damages is supported by the evidence and does not represent an abuse of the jury's discretion.[7]

---

[7] Under the standards of appellate review set forth above, the Court of Appeal need not look to similar awards in similar cases unless it determines that there was an abuse of discretion. If Your Honors feel it is necessary to look to other awards, we refer the Court to recent decisions in *Burton v. Berthelot*, 567 So.2d 649 (La. App. 4th Cir. 1990), and *Mitchell v. Clark Equipment Co.*, 561 So.2d 175 (La. App. 5th Cir. 1990). In *Burton*, the Fourth Circuit approved an award of general damages totalling $377,000 for physical and mental pain and suffering following a

ARCASA also contends that the jury's award of $300,000 for future medical expenses is excessive and an abuse of discretion.

In this regard the law is clear that "future medical expenses must be established with some degree of certainty. However, an award of future medical expenses is in great measure highly speculative and not susceptible of calculation with mathematical certainty." *Burton v. Berthelot*, 567 So.2d at 663. (Citations omitted.)

Here, the award of future medical expenses is justified by the testimony of both of Mr. Young's treating physicians as to the need for medical treatment for the remainder of Mr. Young's life.

Specifically, Dr. Watermeier testified that Mr. Young (1) would continue to have to be followed on a regular basis by an orthopedic surgeon; (2) would require surgery to relieve his carpal tunnel syndrome in his wrist at a probable cost of $2,000 to $3,000 (Record, Vol. IV, pp. 226-228); (3) might require an anterior lumbar fusion at an estimated cost of $15,000 to $20,000; (4) would need intermittent hospitalizations for morphine injections every two months at a cost of $2,000 per treatment; (5)

---

back injury. But in Burton the plaintiff had had one back surgery with a resulting permanent disability before the injury in question. And, more importantly, there is nothing like the same objective evidence in that case as here indicating continued severe physical pain requiring extraordinary treatment measures providing only temporary relief. In *Mitchell*, the Court of Appeal affirmed a jury verdict in the amount of $400,000. Comparing the description of the injuries in that case with what Jerry Young has suffered, we again respectfully suggest that a much higher award would be justified here.

would need office visits and office anesthetic injections at a cost of $34 per visit and $22 per injection every month or every other month. (Record, Vol. IV, p. 230.)

The psychiatrist, Dr. Newman, testified that Mr. Young would continue to require supportive psychotherapy every two weeks at a cost of $82.50 per session and that this could be expected to continue for the rest of Mr. Young's life. In addition, Mr. Young would probably continue to require antidepressant medication.

Given the above testimony, the jury could reasonably conclude there was a reasonable probability that Mr. Young would require future medical care and treatment at a cost in the range of $12,000 to $15,000 a year for the remainder of his life. On this record, the award of $300,000 is well within the jury's discretion.

Finally, defendant ARCASA takes issue with the jury's awards for past and future loss of earnings and earning capacity.

The jury awarded $175,000 for Mr. Young's loss of earnings from the date he was hurt on November 22, 1982 until the time of trial in 1989.

From the evidence, the jury could have concluded that Mr. Young's annualized income for 1982 would have been approximately $25,000 and that various members of his former crew had continued to earn an income in this range from that time until the time of trial. (Record, Vol. V, pp. 196-197, 329; Vol. IV, pp. 66-68.) Since seven years had elapsed since the time of Mr. Young's injury, the jury undoubtedly simply multiplied $25,000 by 7 to reach its award of $175,000.

Certainly this was within the jury's discretion.

ARCASA also contends that the jury's award of $460,000 for loss of future earning capacity was excessive. In considering this contention, the Court of Appeal should consider "whether the award can be supported under the interpretation of the evidence most favorable to the plaintiff which reasonably could have been made by the fact finder." *Bailes v. U.S. Fidelity & Guaranty Co.*, 512 So.2d 633, 643 (La. App. 2nd Cir. 1987).

ARCASA contends that the *maximum* the jury could have reasonably awarded for lost earnings would have been $331,097 based upon the testimony of the expert economist, Dr. Philip Jeffress. But obviously the jury was not "bound" by the testimony of either of the economists. *Brown v. Southern Farm Bureau Ins. Co.*, 426 So.2d 684 (La. App. 1st Cir. 1982). Rather, the test is whether or not the award was justified based upon all the evidence available.

Mr. Young was 52 years old at the time of trial. The jury reasonably could have decided that Mr. Young could have worked for an additional 18 years with approximate earnings of $25,000, and his future loss of earnings would have been in the range of $460,000. Clearly, the jury was not required as a matter of law to use any specific discount factor and could lawfully use the total offset method in calculating Mr. Young's loss of future earnings. *Schwamb v. Delta Air Lines*, 516 So.2d 452, 465 (La. App. 1st Cir. 1987).

3. THE TRIAL COURT DID NOT IMPROPERLY SUBMIT CLAIMS TO THE JURY, AND IT GAVE PROPER JURY INSTRUCTIONS.

Both defendants contend that the trial court erroneously submitted theories of recovery to the jury and gave improper jury instructions.

But it is clear that the defendants are foreclosed from any objection to the jury instructions because they made no objection whatever to the charges that were given. (Vol. III, p. 91, ll. 6-8, p. 93, ll. 4-6.) *Gordon v. Hubbard*, 541 So.2d 211, 212 (La. App. 4th Cir. 1989).

In this regard, article 1793 C of the Louisiana Code of Civil Procedure provides as follows:

> A party may not assign as error the giving or the failure to give an instruction unless he objects thereto either before the jury retires to consider its verdict or immediately after the jury retires, stating specifically the matter to which he objects and the grounds of his objection . . .

The defendants rely upon the decision of the Fifth Circuit in *Woods v. Sammissa Co., Ltd.*, 873 F.2d 842, in support of their argument that Judge Johnson improperly submitted the failure-to-warn claim to the jury in this case. But in *Woods*, unlike here, the defendants specifically moved for a directed verdict on the failure-to-warn theory and objected to the jury's being charged with respect to it. If the defendants had not made this objection, the Fifth Circuit would not have considered any claim of error on appeal. The Fifth Circuit specifically addressed this with respect to the fact that the jury in

Woods was erroneously charged with respect to the third *Scindia* duty, stating the following:

> Under the law of this circuit, therefore, the jury should not have been charged on the third *Scindia* duty. Because the defendants, preferring to concede that the third duty applied and to argue that the evidence was insufficient to support a finding that it had been breached, did not raise this issue in their motions for directed verdict and j.n.o.v., we cannot find error on this ground.

873 F.2d at 853, n.14.

Since the defendants made the same strategic decision here, they must be similarly foreclosed from the allegation of error.

But even if the defendants' arguments had been properly preserved for appeal, we respectfully suggest that they would not be well-founded.

In this case, as distinguished from *Woods*, there is a factual basis upon which the jury could have properly determined that the defendants were obligated to warn the off-loading stevedore about the manner of the stow of the steel cargo. The record in this case shows that the loading stevedore and vessel charterer, Ensidesa, knew that the cargo was being stowed in the "H" manner, knew that this would increase the likelihood of the destruction of the dunnage, knew that there were special tools available to facilitate the removal of the cargo under such circumstances, and knew that this equipment was unknown to American stevedores. Under such circumstances, the jury could have determined that the defendant was liable not only for failing to provide the off-

loading stevedores with a safe place to work, but also for failing to warn of the need for special equipment.

4. THE TRIAL JUDGE PROPERLY CHARGED THE JURY ON THE LAW RELATIVE TO COOPER STEVEDORING AND PROPERLY DECLINED TO SUBMIT A JURY INTERROGATORY REGARDING COOPER STEVEDORING'S "COMPARATIVE NEGLIGENCE."

The longshoreman's exclusive remedy against the stevedore/employer is for workman's compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 905. As a consequence of the exclusive-remedy provision, the United States Supreme Court has held that a shipowner sued by an injured stevedore cannot circumvent the rule by obtaining contribution from a concurrently negligent employer. *Edmonds v. Compagnie Generale Transatlantique*, 443, U.S. 256, 268, 99 S.Ct. 2753, 2760 (1979)[8]; *Woods v. Sammissa*, 873 F.2d 842, 846; *Hill v. Texaco*, 674 F.2d 447, 449 (5th Cir. 1982).

---

[8] *Id.* at 2760: "As we have said, section 905 permits the injured longshoreman to sue the vessel and exempts the employer from any liability to the vessel for any damages that may be recovered. Congress clearly contemplated that the employee be free to sue the third-party vessel to prove negligence and causation on the vessel's part and to have the total damages set by the court or jury without regard to the benefits he has received or to which he may be entitled under the Act. Furthermore, under the traditional rule, the employee may recover from the ship the entire amount of the damages so determined. If he recovers less than the statutory benefits, his employer is still liable for the statutory amount.

"Under this arrangement, it is true that the ship will be liable for all of the damages found by the judge or jury; yet its

This decision has two implications in the context of this trial.

First, as defendant ARCASA properly requested, the jury was charged extensively on the law regarding the bearing of Cooper's alleged negligence on this case. (Vol. VII, 4/26/89, pp. 3-5, pp. 28-29, l. 10; p. 31, ll. 4-12; p. 32, ll. 8-14; p. 33, ll. 16-25; p. 34, l. 17 to p. 35, l. 20.)[9]

---

negligence may have been only a minor cause of the injury. The stevedore-employer may have been predominantly responsible; yet its liability is limited by the Act, and if it has lien rights on the longshoreman's recovery it may be out-of-pocket even less."

[9] In pertinent part, Judge Johnson instructed the jury as follows: In comparing fault as I said a longshoreman's award may be reduced by that portion of damages assignable to his own fault. As a matter of maritime law, the shipowner or the charterer of a vessel would be responsible to the plaintiff in full for the remainder of damages even if the stevedore, Cooper in this case, was also negligent or contributed to his injuries. The longshoreman may recover the total amount of his damages from the vessel owner Ensidesa and/or the charterer of the vessel or the owner of the vessel ARCASA if their negligence was a contributing cause of his injury even if the stevedore Cooper is partly to blame. (Record, Vol. VII, 4/26/89. at 28, ll. 1-16.)

If you find that the accident was caused solely by negligence of the plaintiff and the stevedore Cooper or Cooper employees, then you must find in favor of the defendants. (*Id.* at 28, ll. 17-21.)

As a general rule the shipowner may rely on the stevedore to avoid exposing the longshoreman to unreasonable hazards. This is because the federal statutes require the stevedore which is the longshoreman's employer to provide a reasonably safe place to work and to take safeguards with respect to equipment and working conditions. (*Id.* at 31, ll. 4-12.)

ARCASA and Ensidesa would have no duty by way of supervision or inspection to exercise reasonable care to discover

Second, since the employer/stevedore's negligence would not, even if proved, affect the longshoreman's recovery, the Fifth Circuit has held that there is no reason to submit the issue of the stevedore's negligence to the jury. *Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884, 885 (5th Cir. 1978).

---

dangerous conditions that develop within the confines of the cargo operations. It is a stevedore who must see to the safety of cargo operations. (*Id.* at 32, ll. 8-14.)

The primary responsibility for the safety of Mr. Young rested upon Cooper Stevedoring. Under the law Ensidesa and ARCASA would be entitled to rely on Cooper not to expose its employees to unreasonable hazards and Ensidesa and ARCASA would have no duty to anticipate the action or inaction of a careless stevedore or to anticipate negligence on their part or to supervise them. (*Id.* at 33, ll. 16-25.)

The shipowner and the charterer of the vessel within limits would be entitled to rely on the stevedores and owes no duty to the longshoreman as I said to inspect or supervise the cargo operations. (*Id.* at 34, ll. 17-22.)

Once the longshoreman employees of Cooper began working, Ensidesa and ARCASA had no general duty under the law to discover a dangerous condition that developed within the confines of the stevedore's operation. (*Id.* at 34, l. 23, to 35, l. 1.)

Actual knowledge of a dangerous condition by the owner or charterer of the vessel which condition later injured a longshoreman would not in itself make the owner or character of the vessel negligent. It might well be reasonable for the owner or charterer to rely on the stevedore's judgment that the condition though dangerous was safe enough. (*Id.* at 35, ll. 2-10.)

The shipowner or charterer is not responsible for the negligence of the stevedore or its employees such as the flagman or crane operator. In other words, ARCASA and Ensidesa are not responsible for the negligence of Cooper or Cooper employees. The shipowner or charterer itself must be actually at fault and that fault must be the proximate cause of the plaintiff's injury. (*Id.* at 35, ll. 11-20.)

Defendant cites two cases for the proposition that an interrogatory concerning Cooper's comparative negligence should have gone to the jury. *Lemire v. New Orleans Public Service, Inc.*, 458 So.2d 1308 (La. 1984), and *Nance v. Gulf Oil Corp.*, 817 F.2d 1176 (5th Cir. 1987). In both of these cases, Louisiana law, not the maritime law, governed the substantive rights of the parties.

Moreover, in *Nance*, the court applied Louisiana Civil Code article 2324 as amended in 1987. Even if Louisiana law governed this issue, article 2324 as amended in 1987 could not be retroactively applied. *Morrison v. J.A. Jones Const. Co., Inc.*, 537 So.2d 360 (La. App. 4th Cir. 1988).

THE COURT DID NOT ERR IN ITS RULINGS ON VARIOUS PRETRIAL AND EVIDENTIARY MATTERS.

The defense has objected to virtually every pretrial and evidentiary ruling made by the trial court, as will be discussed below.

Prior to taking up each issue, a discussion of the course of this litigation is in order.

Suit was filed on October 21, 1984.

Between 1984 and 1989, the plaintiff conducted discovery.

Plaintiff filed the first motion to set for trial on December 30, 1987, and the trial was set for November 9, 1988. On June 30, 1988, however, Ensidesa filed a motion to continue trial. Trial was later set for April 17, 1989, as a special first fixing.

On Thursday, March 30, 1989, 18 days before trial, Ensidesa informed plaintiff for the first time that it had retained a *new* liability expert and of appointments unilaterally made for Jerry Young to undergo independent medical examinations one week prior to trial. On March 31, 1987, plaintiff filed a motion to strike the testimony of the new expert and to cancel the independent medical examinations. On April 3, 1989, at the pretrial conference, plaintiff's motion was granted. On April 5, 1989, Ensidesa sought supervisory writs with this court, which were denied.

On April 14, 1989, Ensidesa filed a motion to continue the trial, alleging that it had uncovered new evidence that Jerry Young had been shot in a gun fight. The plaintiff responded immediately and the motion was denied.

5. THE TRIAL COURT PROPERLY DENIED ENSIDESA'S MOTION TO CONTINUE THE TRIAL.

On April 14, 1989, (three days before this trial was scheduled to begin) Ensidesa filed a motion to continue, alleging that it had just uncovered "new evidence" that the plaintiff had suffered gunshot wounds and that this required additional discovery.

Article 1601 of Louisiana Code of Civil Procedure provides that "a continuance may be granted in any case if there is good ground therefor." The decision to grant or deny a continuance on this basis rests within the sound discretion of the trial court and will rarely be interfered

with by the court of appeal. *Armstrong v. State Farm Fire and Casualty Co.*, 423 So.2d 79, 82 (La. App. 1st Cir. 1982).

Article 1602 of Louisiana Code of Civil Procedure provides that: "A continuance shall be granted if at the time a case is to be tried, the party applying for a continuance shows that he has been unable, with the exercise of due diligence, to obtain evidence material to his case . . . " Under this article, the "party moving for a continuance has the burden of proving that his motion falls within these peremptory grounds." *Collier v. Williams-McWilliams Co., Inc.*, 459 So.2d 719, 722 (La. App. 4th Cir. 1984).

In this case, the trial court properly denied the defendant's motion for a continuance because the alleged "new evidence" had, in fact, been known to the defendants for over two years.

In 1987 Dr. Monroe Laborde, the orthopedist hired by Ensidesa to evaluate Jerry Young, wrote Ensidesa's counsel a report informing him of the gunshot wound. (Record, Vol. VII, pp. 31-33.) Subsequently, in September 1988, Dr. Rene Culver, the psychiatrist Cooper hired to do an independent evaluation of Jerry Young, wrote Ensidesa's counsel an extensive report that discussed the gunshot incident and the subsequent surgery. (Record, Vol. VI, p. 212.)

Since the defendants had, in fact, obtained evidence with respect to this gunshot wound far in advance of the trial, we respectfully suggest that the trial court correctly denied their motion to continue on this basis.

6. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING ENSIDESA'S LIABILITY EXPERT AND CANCELING THE APRIL 1989 INDEPENDENT MEDICAL EXAMINATIONS.

On March 30, 1989, 18 days before the scheduled trial, Ensidesa first informed plaintiff that it had retained a new expert, Peter Duffy, and that it had unilaterally made appointments for Mr. Young to be seen by two physicians, Dr. Robert Applebaum and Dr. Monroe Laborde just one week before trial.

Plaintiff moved to exclude the testimony of Mr. Duffy and to cancel the scheduled examinations. Finding that these things came too late, the trial court granted the plaintiff's motion, and Your Honors denied the defendants' writ application.

There is no reason for a different decision to be reached now.

The defendants had previously retained, and the plaintiff had deposed, two liability experts, Mr. Henry Feste and A. F. Frazier, both marine surveyors who had actually observed the off-loading of the M/V LORENA. There was no reason these witnesses could not have been called by the defendant.

Moreover, the defendants were not prejudiced by the exclusion of Mr. Duffy because the jury heard substantially the same evidence through various other witnesses. (Casimo Gonzalez Ayesta, deposition introduced at trial, pp. 5, 9, 17; Serafin Garcia, Vol. V, pp. 351, 353, 365; Florentino Quiroz, Vol. V, pp. 407, 416.) *Also, see Dengle v.*

Hibernia National Bank, 539 So.2d 947, 952 (La. App. 4th Cir. 1989); *Falgoust v. Richardson Industries, Inc.*, 552 So.2d 1348, 1355-56 (La. App. 5th Cir. 1989).

With respect to the last-minute medical examinations, the defendants argued that the plaintiff's treating physician, Dr. Watermeier, had only recently made any mention of Mr. Young's carpal tunnel syndrome and that they had to respond to this testimony. But, in fact, Dr. Watermeier had testified concerning the plaintiff's carpal tunnel syndrome in his deposition, which was taken by the defendant more than a year earlier, on November 10, 1987. Under these circumstances, we respectfully suggest that the trial court correctly decided these matters and did not abuse its discretion.

7. THE COURT DID NOT ERR IN PERMITTING THE TESTIMONY OF ALBERT ROSS, JOHNNY PORTER, DOUGLAS LEMOTT AND SAM DOUGLAS REGARDING THE SAFETY OF THE STOW.

The defendants want it both ways. While they object to the testimony by an off-loading surveyor and certain off-loading longshoremen with regard to the safety of the stow, they simultaneously rely upon the testimony of the loading surveyor, loading longshoremen, and another off-loading longshoreman on the same issue. (Charlie Otkins, Vol. VI, pp. 172-189; Deposition, Avesta; Florentino Quiroz, Vol. V, pp. 406-427; Serafin Garcia, Vol. V, pp. 350-391.) Defendants simultaneously proffer as an expert an individual who has never worked at the Port of New Orleans, has little experience loading steel beams, no experience off-loading steel beams and who relied for his

opinion upon ten photographs and an incomplete submission of depositions provided seven years after the incident, one month before trial. (Duffy deposition, pp. 28-31, 32, 33-34, 49-52.) Captain Ross, on the other hand, had substantial experience both loading and unloading steel beams. (Ross, Vol. V, p. 391.) Porter, Lemott and Douglas, likewise relied upon their own experience for their testimony (Lemott, Vol. IV, pp. 33-37, 39, 44-45; Porter, Vol IV, pp. 259-260, 264, 267, 283-288; Douglas, Vol. V, pp. 318-321.)

Qualification of experts is within the discretion of the trial judge and will not be reversed absent manifest error. *Trapani v. State Farm Mutual Automobile Insurance Company*, 524 So.2d 226, 230 (La. App. 5th Cir. 1988). A witness may be qualified as an expert based upon experience as well as knowledge, skill, training or education and may, as here, testify to an ultimate issue to be decided by the trier of fact. (La. C. Evid. arts. 702, 704; *Belk v. Montgomery Ward and Company, Inc.*, 501 So.2d 1008, 1012 (La. App. 2d Cir. 1987); *Roper ex rel Roper v. Gelsomino*, 507 So.2d 868, 871 (La. App. 5th Cir. 1987). A witness, although not testifying as an expert, may give opinions that are rationally based on his perception and are helpful to the determination of a fact in issue. La. Code of Evid. art. 701.

Capt. Ross was abundantly qualified by virtue of his education, training, and experience to testify as an expert witness on the matters involved in this trial.

Capt. Ross graduated from nautical college in 1949 and then worked on ocean-going cargo vessels for the next 15 or 16 years in various capacities, including third

mate, second mate, chief officer and commanding officer. Then, in 1972, he began work as a port captain for Atlantic Shipping, a charterer of vessels. As port captain, it was Capt. Ross's responsibility to supervise the loading and off-loading of cargo from vessels, including steel cargo. He did this for five years until 1977, when he formed his own company and began working as a consulting marine surveyor.

He had been qualified in the federal courts as an expert in marine surveying and had testified with respect to safety considerations in regard to the handling and loading and off-loading of cargo.

It was clearly within the trial court's discretion to accept Capt. Ross as an expert in the area of marine surveyor and as an expert in safety with regard to stevedoring operations.

8. THE ECONOMIST'S TESTIMONY WAS PROPERLY ALLOWED

Ensidesa complains that the trial court failed to strike the testimony of the plaintiff's economist, Dr. Philip Jeffress.

Dr. Jeffress calculated past lost wages of $141,365 and discounted future lost wages of $189,732, totalling $331,097. He based his calculations of both past and future lost wages on an annual income of $25,000, taking into consideration Mr. Young's annualized earnings in 1982 and information concerning the continued earnings of similarly placed longshoremen with similar experience. (Vol. VI, pp. 6, 9, 16, 23-26, 36-37, 45, 63-64; Jerry

Young, Vol. V, pp. 196-197; Sam Douglas, Vol. V, p. 329; Douglas Lemott, Vol. IV, pp. 66-68).

Past lost wages were calculated to date of trial. Since the plaintiff had no opportunity to invest this money, there was no reason whatever to discount this amount. (Vol. VI, p. 6). Dr. Jeffress had assumed a work-life expectancy of 10.1 years based upon the Department of Labor work-life expectancy tables and a 2½ percent below-market discount rate. (Vol. VI, pp. 11-14.)

Dr. Jeffress also testified that, if non wage benefits were not included in Mr. Young's W2 statements, he suffered an additional $62,381 in past losses and $91,743 as the discounted value of his future losses. (Vol. VI, pp. 4, 15, 50-53.)

Mr. Winn Niemond, a representative of the New Orleans Steamship Association, testified that Mr. Young would *not* receive credit for health, welfare and pension benefits after November, 1990. So there was no "double-dipping" on the calculation of Mr. Young's loss of future fringe benefits including pension benefits. (Vol. VI, pp. 77-79.)

Dr. Jeffress was fully cross-examined with respect to his fringe-benefit calculations, the "down turn" in the economy and all the other assumptions in his computations. There was no reason whatever for the court to have stricken his testimony.

9. THE DEFENDANTS WERE NOT PREJUDICED BY BELATED KNOWLEDGE OF PLAINTIFF'S MEDICAL HISTORY AND 1987 AUTOMOBILE ACCIDENT.

The defendants complain that they obtained new medical information just before trial and were prejudiced by not having it earlier. But since the defendants were not diligent in their quest for evidence of Jerry Young's medical history and extraneous casualties, they cannot now complain of the tardiness of their receipt of this information. *Heaton v. Gulf International Marine, Inc.*, 536 So.2d 622, 626 (La. App. 1st Cir. 1988); *Burgess v. City of Baton Rouge*, 477 So.2d 143, 145-46 (La. App. 1st Cir. 1985); *Sather v. White*, 388 So.2d 402, 403 (La. App. 1st Cir. 1980); *Uhler v. Evangeline Riding Club*, 525 So.2d 550, 551-52 (La. App. 3d Cir. 1988); *Webb v. Insurance Company of North America*, 396 So.2d 508, 512 (La. App. 3d Cir. 1981).

The defendants never requested an updated deposition of either Jerry Young or Dr. Watermeier, and first subpoenaed medical records that were not in plaintiff's possession one week before trial.

Furthermore, defendants were not prejudiced because they extensively questioned the plaintiff and various other witnesses regarding Jerry Young's medical condition from 1968 forward, his gunshot wound and his 1987 automobile accident. (Culver, Vol. VI, pp. 212-214, 218-220, 225-228; Laborde, Vol. VII, pp. 19-23, 30, 32; Jerry Young, Vol. V, pp. 282-288, 307; Watermeier, Vol. V, pp. 41-45, 50, 57, 61, 65, 68, 79; Newman, Vol. V, pp. 141-144, 146, 151-153, 159, 167-168, 172, 175, 181-182.)

The bottom line is that all of this was fully aired before the jury.

10. JERRY YOUNG'S CONVICTIONS WERE PROPERLY EXCLUDED.

Ensidesa complains that it was not permitted to cross-examine the plaintiff with respect to certain criminal convictions. Mr. Young pleaded guilty to possession of marijuana pursuant to Louisiana Revised Statute 40:983; therefore, this plea is clearly inadmissible. His conviction for illegal possession of a weapon was a misdemeanor punishable by no more than six months, and therefore was likewise inadmissable. La. C.E. art. 609(A). If Judge Johnson had let defendant counsel go into these matters, it probably would have been reversible error.

11. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING DR. BOGRAN'S REPORT, THE PETITION RESULTING FROM SEPTEMBER 1987 AUTOMOBILE ACCIDENT AND BY THE LIMITATION OF THE REDIRECT OF DR. CULVER.

Ensidesa was permitted extensive cross examination of Jerry Young, and Drs. John Watermeier and Robert Newman, as well as extensive direct examination of Drs. Monroe Laborde and Rennie Culver, on the following subjects: Jerry Young's various minor work injuries between 1968 and 1982; Dr. Burkett's 1980 impression of low-back pain and depression; the September 1987 automobile accident and ensuing lawsuit; and the gunshot incident. (Young, Vol. V, pp. 238-247, 270-287; Watermeier,

Vol. IV, p. 238; Vol. V, pp. 14-15, 31-35, 37-51, 56-62, 65-67; Newman, Vol. V, pp. 141-144, 146, 151-153, 159, 167-168, 172, 175, 181-182; Laborde, Vol. VII. pp. 18-21, Culver, Vol. VI, pp. 212-213, 218-228, 252-259.)

While Judge Johnson permitted Ensidesa extensive examination concerning the 1987 auto accident and the fact that a suit was filed, she did not allow the First City Court petition to be filed in evidence, finding that a client is not bound by what his attorney put in a petition (Vol. VI, pp. 227, 257-259.) She further found the evidence cumulative of counsel's extensive prior examination of Mr. Young on the subject.

Ensidesa incorrectly claims that the court refused to permit Dr. Bogran to testify. On the contrary, the trial court refused to admit his report into evidence *unless* Ensidesa called him to testify. (Vol. VI, pp. 226-227.)

Defendant's complaint is merely that, having offered cumulative evidence on the above subjects, it was not permitted to offer *more* cumulative evidence in its attempt to totally obfuscate the issues.

The court was correct in her ruling that enough was enough and that the relevance of the excluded evidence was substantially outweighed by the risk of unfair prejudice, confusion of the issues, or misleading the jury. La. C.E. art. 403.

12. EVIDENCE OF SUBSEQUENT CHANGE IN STOW PLANS WAS PROPERLY ADMITTED.

In its opening statement and during questioning of each of the Spanish witnesses, counsel for ENSIDESA

brought out that there had *never*, to date of trial, been a complaint by a customer about an "H" stow. Testimony was elicited that ENSIDESA used an "H" stow before this casualty and continues to use an "H" stow today. (Garcia, Vol. V., pp. 378, 379; Quiroz, Vol. V, pp. 407-08.)

Only after these questions were asked did the plaintiff, on cross-examination, for the purpose of impeaching Ensidesa's contentions, elicit testimony that after 1982 the United States and Canada requested that all vessels traveling to those ports be loaded in the "I" method. (Garcia, Vol. V, pp. 390-391; Quiros, Vol. V, pp. 408-409.)

La. Code of Evidence article 407 (which is patterned after the federal rule) excludes subsequent remedial measures to prove negligence or culpable conduct, but allows use of such evidence for other purposes:

> This article does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, authority, knowledge, control, or feasibility of precautionary measures, or for *attacking credibility*.

Emphasis added.

Since the testimony was offered here to rebut a false impression created by the defendant, the trial court was correct in permitting the testimony into evidence. *Muzyka v. Remington Arms Co., Inc.*, 774 F.2d 1309, 1313 (5th Cir. 1985).

13. THE PLAINTIFF'S CLOSING ARGUMENT WAS NOT IMPROPER.

Both defendants contend that the trial court should have ordered a new trial because of the plaintiff's alleged improper closing argument.

In this regard, the law is clear that counsel has great latitude in argument before the jury. Flights of eloquence and touches of pathos are allowable as long as they are based on the facts of the case. Appeals to sympathy are not necessarily considered improper and furnish no grounds for complaint. *Fields v. Senior Citizens Center, Inc.*, 528 So.2d 573, 583 (La. App. 2d Cir. 1988).

Furthermore, the trial court properly cautioned the jury at the beginning and conclusion of the trial that arguments of counsel were not evidence. (Vol. IV, pp. 12-13, 18, 22.) *Williams v. Sentry Insurance Co.*, 370 So.2d 901, 903 (La. App. 1st Cir. 1979).

We agree that it is improper for counsel to ask the jury to put themselves in the plaintiff's shoes *with respect to damages*. But that is not what was done here. Rather, plaintiff's counsel sought to dispel any adverse inferences the jury might draw from the fact that the plaintiff's wife and children were not at trial by stating, "You would not want to subject your own spouse and children to a trial like this if you were Mr. Young."

Since the argument was not addressed to the issue of damages at all, it was not objectionable, much less so prejudicial so as to require a new trial. *Duerden v. PBR Offshore Marine Corp.*, 471 So.2d 1111, 1114 (La. App. 3d Cir. 1985).

"The trial court is in a better position than an appellate court to determine the possible prejudicial effects resulting from counsel's argument before a jury. Its refusal to grant a new trial should therefore be accorded great weight." *Ogletree v. Willis-Knighton Memorial Hospital*, 530 So.2d 1175, 1181 (La. App. 2nd Cir. 1988).

14. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL BASED UPON ALLEGED JUROR MISCONDUCT.

After the return of the jury's verdict, the defendants timely filed a motion for a judgment notwithstanding the verdict or, alternatively, a motion for a new trial based upon the alleged misconduct of one of the jurors. In support of its motion, the defendants sought to introduce into evidence the affidavit testimony of three jurors who opposed the jury's verdict.

Plaintiffs objected to the admissibility of the affidavits to impeach the jury's verdict.

The trial court denied the defendants' motions without indicating whether or not the affidavits had been admitted.

In this appeal the defendants again urge that the jury's verdict should be set aside for alleged misconduct and again base this contention upon the affidavit testimony submitted to the trial court.

We respectfully suggest that the affidavit testimony is not admissible and that there is no basis upon which to set aside this verdict upon alleged juror misconduct.

Article 606 B of the Louisiana Code of Evidence specifically provides as follows in this regard:

> **B. Inquiry into Validity of Verdict or Indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question of whether any outside influence was improperly brought to bear upon any juror . . . Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

The defendants apparently concede that they cannot introduce the affidavit testimony to attack the jury's verdict and so now, for the first time, suggest that the affidavit testimony is admissible on another basis; that is, to ascertain whether a juror responded untruthfully on voir dire.

While it is true that prior to the adoption of the Code of Evidence the Louisiana jurisprudence had recognized this narrow exception to the general rule, there are two reasons why Your Honors should refuse to consider the affidavits in this appeal.

First, the defendants never raised below any question concerning any juror's truthfulness in response to the voir dire examination. Having failed to make this argument before the trial court in its motion for a new trial, the defendants should be precluded from doing so here. *Handy v. Cheatum*, 410 So.2d 322, 323 (La. App. 4th Cir. 1982).

Secondly, the affidavits in question do not in fact demonstrate that any juror responded untruthfully to any specific questions posed during the jury interrogation. The Louisiana jurisprudence on this subject is clear that this exception "should not be employed where the alleged untruthful statement was a general one that the juror could not render an impartial verdict." *Bennett v. Sedco Maritime*, 520 So.2d 894, at 904 (La. App. 3d Cir. 1987).

Here, there is absolutely nothing in the affidavit testimony offered by the defendants that specifically impeaches any answers provided by any juror at the time of the voir dire examination. The defendants are using this argument as a pretext to attempt to introduce affidavit testimony of jurors to impeach the jury verdict, a clearly impermissible purpose. The affidavits themselves address juror Granderson's alleged offensiveness during deliberations. But "the presence on a jury of a highly opinionated person does not constitute improper behavior so as to preclude achievement of impartial justice" within the meaning of Louisiana Code of Civil Procedure article 1972. *Blandino v. Brown Erection Co., Inc.*, 341 So.2d 577, 580 (La. App. 2d Cir. 1977).

We respectfully suggest that Judge Johnson did not abuse her discretion in refusing to grant the defendants' motion for a new trial and that there is no reason, on this appeal, to reverse her decision.

15. INDEMNITY.

Both defendants take issue with Judge Johnson's refusal to grant contractual indemnity to either party. Since it is clear that both defendants are solidarily liable to the plaintiff, we have not addressed this issue.

CONCLUSION

For the reasons set forth above, Mr. Young respectfully suggests that the jury's verdict awarding him damages in the amount of $1,700,000 against both ARCASA and Ensidesa was supported by substantial evidence and that there was no error requiring a reversal of the judgment of the trial court. We respectfully suggest that this judgment should be affirmed at appellants' cost.

Respectfully submitted,

/s/ Fredericka Homberg Wicker
FREDERICKA HOMBERG WICKER, 6977

/s/ Lawrence S. Kullman
LAWRENCE S. KULLMAN, 7884

LEWIS AND KULLMAN
2615 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
(504) 588-1500

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 10th day of December, 1990, served a copy of the foregoing original brief of appellee on counsel for all parties to this proceeding by mailing the same by U.S. mail properly addressed, and first class-postage prepaid.

/s/ Fredericka Homberg Wicker